TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 570

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JOHN C. SHAW, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF SYDNEY C. McLOUTH, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI FILED DECEMBER 5, 1939
CERTIORARI GRANTED JANUARY 8, 1940

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CALENDAR ENTRIES

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Feb. 3. Exemplification of record filed.
Feb. 4. Calendar praecipe filed.
Feb. 4. Proof of service filed.
Feb. 25. Motion to quash removal petition filed.
Feb. 26. Opinion filed.
Feb. 25. Notice of hearing filed.
Feb. 25. Petition for removal filed.
Feb. 25. Proof of service filed.
Mar. 29. Motion and notice of hearing filed.
Aug. 13. Affidavit opposing motion filed.
Sept. 2. Affidavit of O. P. M. Brown filed.
Oct. 18. Decision on motion filed.
Oct. 25. Brief in opposition to pending motion filed.
Nov. 22. Order

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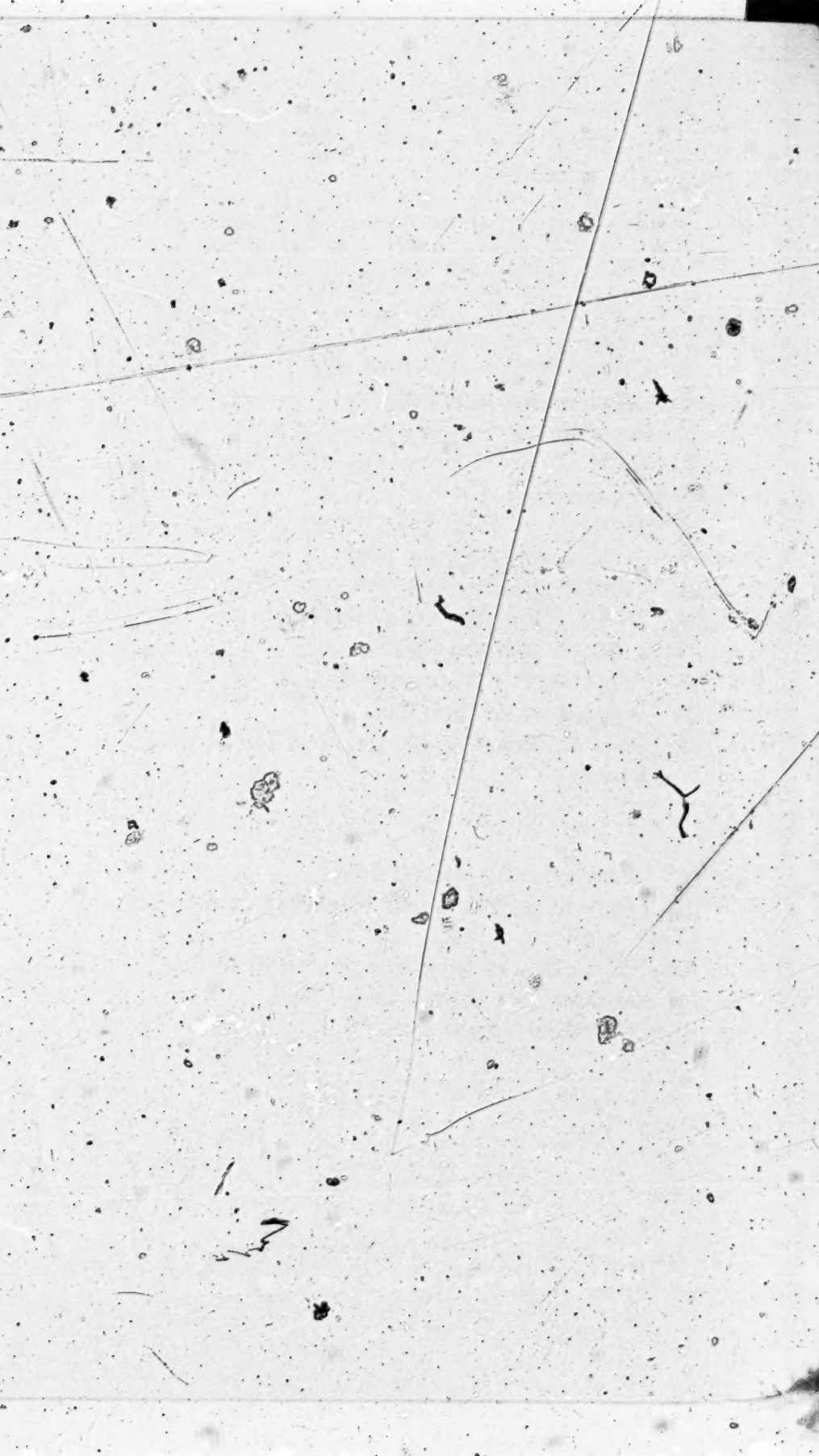
Feb. 8. Order granting appeal filed.
Feb. 18. Claim of appeal, proof of service and notice filed.
Mar. 10. Stipulation as to record on appeal filed.
Mar. 10. Certificate of Circuit Judge filed.
Mar. 10. Record on appeal filed.



STATE OF MICHIGAN

SUPREME COURT

Appeal from the Circuit Court for the County of St. Clair
Honorable Fred W. George, Circuit Judge

In re the Estate of SYDNEY C. McLOUTH,
Deceased.

UNITED STATES OF AMERICA,
Appellant in St. Clair County
Circuit Court,
Appellant herein,

v.

JOHN C. SHAW, Administrator de bonis non
of said Estate,
Appellee in St. Clair County
Circuit Court,
Appellee herein.

No. 1

RECORD ON APPEAL

JOHN C. LEHR,
United States Attorney,
PETER P. GILBERT,
Assistant United States Attorney,
829 Federal Building,
Detroit, Michigan,
OLIVER P. M. BROWN,
Special Assistant United States Attorney,
4223 Commerce Building,
Washington, D. C.,
Attorneys for Appellant.

STEWART & BLACK,
407-9 First National Bank Building,
Port Huron, Michigan,
EDWARD T. KANE,
Boynton Block,
Port Huron, Michigan,
Attorneys for Appellee.

STIPULATION AS TO RECORD ON APPEAL

(Filed March 10, 1939)

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the Record in the above entitled cause on appeal to the Supreme Court shall consist of:

1. This Stipulation.
2. Copy of Order of Supreme Court Allowing the Appeal, showing date of Order.
3. The List of Calendar and Journal Entries in the Cause.
4. Statement of Reasons and Grounds of Appeal.
5. Complete Record on Appeal from Probate Court as originally filed in the Circuit Court.
6. Calendar Praecipe and Notice of Hearing in Circuit Court.
7. Petition of this Appellant for Removal of Suit.
8. Notice of Hearing on Petition for Removal and Proof of Service of Notice.
9. Motion to Quash Removal Petition.
10. Stenographer's Transcript of Proceedings in Circuit Court.
11. Opinion of Circuit Judge filed February 26, 1938.
12. Journal Entry of Judgement affirming Probate Court Order as entered February 26, 1938, and Journal Entry of Nunc Pro Tunc Amendment entered February 28, 1938.
13. Motion to Set Aside Nunc Pro Tunc Amendment.

14. Decision of Circuit Judge on Motion to Set Aside Nunc Pro Tunc Amendment, as filed October 18, 1938.

15. Journal Entry of Order Granting Motion to Vacate Nunc Pro Tunc Amendment, as entered November 22, 1938.

16. Statement of Proceedings and Facts and Certificate of Circuit Judge thereto.

17. Claim of Appeal.

18. Notice of Appeal.

19. Certified Copy of Judge Lederle's Order for Remand.

20. Certificate of Circuit Court.

John C. Lehr,
United States Attorney.

By: Peter P. Gilbert,
Assistant United States Attorney,
Federal Building,
Detroit, Michigan.
Oliver P. M. Brown,
Special Assistant United States
Attorney,
No. 4221 Commerce Building,
Washington, D. C.,
Attorney for Appellant.
Stewart and Black,
407-9 First National Bank Building,
Port Huron, Michigan.
Edw. T. Kane,
Boynton Block,
Port Huron, Michigan,
Attorneys for Appellee.

ORDER GRANTING APPEAL

(Filed February 8, 1939)

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court room in the Capitol, in the City of Lansing, on the second day of February, in the year of our Lord one thousand nine hundred and thirty-nine.

Present the Honorable Henry M. Butzel, Chief Justice; Howard Wiest, George E. Bushnell, Edward M. Sharpe, William W. Potter, Bert D. Chandler, Walter H. North, Thomas F. McAllister, Associate Justices.

In this cause an application is filed by appellant for leave to appeal from the judgment of the Circuit Court for the County of St. Clair, and nothing in opposition thereto having been filed by appellee, and due consideration thereof having been had by the Court, it is ordered that the application be and the same is hereby granted.

State of Michigan—ss.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 3rd day of February, in the year of our Lord one thousand nine hundred and thirty-nine.

Jay Mertz,
Clerk.

(Seal)

ORDER AFFIRMING PROBATE COURT ORDER OF DECEMBER 22, 1937

(Circuit Court Journal 27, Page 235).

At a General Term of the Circuit Court for the County of St. Clair, held at the Court House in the City of Port Huron, said County, on Saturday, February 26th, A. D. 1938.

Present: Honorable Fred W. George, Circuit Judge.

On finding by the Court that appellant has failed to prosecute the appeal herein, and on motion of appellee, it is adjudged that the Probate Court order of December 22, 1937, be and the same is hereby affirmed.

Thereupon court adjourned until Monday morning at 9:30 o'clock.

Read, approved and signed in open court this 28th day of February, A. D. 1938.

Fred W. George,
Circuit Judge.

REASONS AND GROUNDS OF APPEAL

(Filed .....)

And now comes the appellant, United States of America, by John C. Lehr, United States Attorney, Peter P. Gilbert, Assistant United States Attorney and Oliver P. M. Brown, Special Assistant United States Attorney, attorneys for appellant, at the direction of the Attorney General of the United States, and says that in the record and proceedings in said cause in the Circuit Court there is manifest error and the judgment therein, en-

tered by the Circuit Court for the County of St. Clair on the 26th day of February, A. D. 1938, is unjust to appellant, as follows:

1. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because said order and judgment deprives appellant of property rights without due process of law.

2. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because that special tribunal did not possess jurisdiction over the person of the United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation) against whom the claim of set-off was exhibited by the Administrator.

3. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because the claim exhibited by the Administrator was for a balance due from a person other than the claimant-appellant.

4. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because that special tribunal did not possess jurisdiction over the subject matter.

5. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because the claim in off-set exhibited by the Administrator was barred by the statute of limitations.

6. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because no evidence was produced either before said Probate Judge or in the Circuit Court, to prove that the claim in off-set exhibited by the Administrator was an existing contractual obligation of the United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation) on the date Section 203, (U. S. Code, Title 46, Section 1113). Merchant Marine Act, 1936, (49 Stat. 1985) became effective.

7. The Circuit Court erred in affirming the order and judgment of the Probate Judge, acting as Commissioners on Claims, because that special tribunal did not possess jurisdiction to enter any affirmative judgment against this appellant.

And for the errors aforesaid appellant says that the judgment entered in said cause ought to be reversed, vacated and held for naught.

John C. Lehr,
United States Attorney.

By: Peter P. Gilbert,
Assistant United States Attorney,
Federal Building,
Detroit, Michigan.

Oliver P. M. Brown,
Special Assistant United States Attorney,
No. 4221, Commerce Building,
Washington, D. C.

PROOF OF SERVICE.

(Filed February 4, 1938)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of Sydney C. McLouth, Deceased.

County of St. Clair—ss.

Peter P. Gilbert, being duly sworn, says:

I served upon Eugene F. Black, one of the members of the firm of Stewart & Black, attorneys, a copy of the order, of which the foregoing and annexed is a true copy, on the 31st day of January, A. D. 1938, at the City of Port Huron, in said county, by delivering the same to Eugene F. Black personally.

Further, that on the 3rd day of February, A. D. 1938, I served a copy of the order upon John C. Shaw, Administrator of the Estate of Sydney C. McLough, Deceased, by delivering the same to John C. Shaw personally, at the City of Detroit, Wayne County, Michigan.

Peter P. Gilbert.

Subscribed and sworn to before me this 4th day of February, A. D. 1938.

John C. Ray,
Notary Public, Wayne County, Michigan.
My commission expires February 3, 1941.

PETITION FOR ALLOWANCE OF BALANCE DUE ESTATE ON SET-OFF AGAINST CLAIM OF UNITED STATES OF AMERICA

(Filed .....)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of
Sydney C. McLouth, Deceased.

Comes now John C. Shaw, administrator de bonis non of said estate, and gives unto this Honorable Court to be advised and informed as follows:

1. That on or about the 14th day of November, 1935, this Court, acting by statute in the place and stead of Commissioners on Claims, entered an order in this proceeding allowing, as a claim of the third class, a claim of United States of America against said estate in the sum of $40,165.40, plus interest thereon at 5% per annum from April 25, 1933, and disallowing the estate's pleaded set-off against said claim, which set-off was and is based upon this Court's order of October 13, 1932, allowing in full the claim of Ingram-Day Lumber Company in the sum of $58,089.04. Said order of November 14, 1935, is a part of this Court's file in the matter of this proceeding and reference thereto is hereby made.

2. That on or about the 8th day of February 1937, by judgment of the Circuit Court for said County and State, duly entered an appeal therefrom, said order of November 14, 1935, was duly reversed. A certified copy

of said judgment is herewith filed as and for due remand of the appeal to this Court.

3. That on or about September 1, 1937, by judgment of the Supreme Court of said State, duly entered on appeal therefrom as shown by Volume 281 of Michigan Official Reports, said Circuit Court judgment was duly affirmed.

4. That by such judgment of said Circuit Court the estate's set-off as pleaded against said claim was duly adjudged and adjudicated to be the just and proper obligation owing to said estate by United States Shipping Board Emergency Fleet Corporation (Name changed to United States Shipping Board Merchant Fleet Corporation by Act of February 11, 1927, 46 U. S. C. A. 810), and as such that it was a proper set-off, within the meaning of Compiler's Section 15682 of the Michigan Compiled Laws of 1929, to said claim of United States of America, and petitioners allege that it is the consequent duty of said Court order said last mentioned statute to ascertain and duly allow, in favor of said estate and against said claimant United States of America, the balance in favor of said estate representing excess of such adjudicated set-off over and above such claim of United States of America, especially considering the provisions of the Federal Merchant Marine Act of 1936, by the terms of which all obligations of said Fleet Corporation were unequivocally assumed by said claimant United States of America.

* * * * *

Considering the premises, petitioner prays that this Court, acting in the place and stead of Commissioners of Claims and in pursuance of the mandatory provisions of Compiler's Section 15682 of the Michigan Compiled

Laws of 1929, grant statutory judgment of allowance, against United States of America and in favor of said estate, of the existing balance due said estate, on account of its adjudicated counter cause of action, over and above said claim of United States of America.

John C. Shaw, Administrator
de bonis non of the Estate of
Sydney C. McLouth, Deceased.
By: Eugene F. Black,
Attorney and Agent.

State of Michigan,
County of St. Clair—ss.

On this 20th day of November, 1937, before me, a Notary Public in and for said County, personally appeared the above named Eugene F. Black, who executed the foregoing petition in my presence, who made oath that he has read same, that he knows the contents thereof and that the statements therein contained are true of his own knowledge, and who made further oath in my presence that he is duly authorized to execute said petition for and in behalf of said petitioner, and that he executes same for the reason that the facts and statements therein alleged are within his knowledge and are not within the personal knowledge of said petitioner.

Sally Montgomery,
Notary Public, St. Clair, County, Michigan.
My commission expires 5/20/39.

Stewart & Black,
Attorneys for Administrator,
407-9 First Nat'l. Bank Bldg.,
Port Huron, Michigan.

NOTICE OF HEARING ON PETITION

(Filed .....)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of
Sydney C. McLouth, Deceased.

To: John C. Lehr,
United States District Attorney,
Eastern District of Michigan.

Take notice that the within and attached petition will be brought on for hearing before said Court on Monday, December 6, 1937, at 2:00 o'clock P. M.

Yours, etc.,

Stewart & Black,
Attorneys for Administrator,
407-9 First Nat'l. Bank Bldg.,
Port Huron, Michigan.

Dated: November 20, 1937.

ORDER DISALLOWING CLAIM OF UNITED STATES OF AMERICA

(Filed .....)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of
Sydney C. McLouth, Deceased.

At a session of said Court held at the Court House in the City of Port Huron, St. Clair County, Michigan, on December 22nd, 1937.

Present: Hon. Clair R. Black, Judge of Probate.

Stewart and Black appearing for Administrator and Petitioner.

Peter P. Gilbert, Assistant United States District Attorney appearing for the United States Government.

Petition for allowance of balance due estate on set-off against the claim of United States of America.

OPINION AND ORDER

This petition presents but one question, namely, Does this Court have jurisdiction to grant a judgment against the Government where the off-set exceeds the Government's claim, or in allowing the off-set does it merely extinguish the Government's claim?

On September 1, 1937, the Supreme Court upheld the Circuit Court of this County in directing disallowance in full of the claim of United States of America against said estate. In doing so, the Supreme Court determined that this Court had jurisdiction to hear and determine the set-off which was exhibited against said claim and adjudicated that such set-off was an obligation of United States Shipping Board Merchant Fleet Corporation owing to the deceased which was properly assertable in offset. In re McLouth's Estate, 281 Mich, 191.

The proceeding is now in this Court on remand for entry of order disallowing the Government's claim and for further proceedings not inconsistent with the aforesaid rulings of the Circuit and Supreme Courts. On such remand John C. Shaw, administrator of said estate, filed petition for ascertainment and allowance under Section 15682 of the Compiled Laws of Michigan, of the balance owing the estate on its adjudicated set-off. The petition was duly brought to hearing and it is resisted by the United States, represented by the District Attorney's office in Detroit, on the sole ground that this Court is without jurisdiction to grant an affirmative judgment against the Government under the rule of United States v. Eckford, 73 U. S. 484, United States v. Nipissing Mines Co., 206 Fed. (C. C. A.) 431, and similar cases.

The amount of the set-off so adjudicated is not shown by the Supreme Court's opinion but it fully appears in the records of this Court. On October 13, 1932, this Court duly allowed against the estate the claim of Ingram-Day Lumber Company in the sum of $58,089.04. The amount of the claim represented the judgment of the United States Supreme Court (275 U. S. 471) in

the sum of $42,789.96, plus interest and taxable costs. Interest at the legal rate on the claim to December 8, 1937, amounts to $14,982.34 making a total of $73,071.38. The amount of the Government's claim was $40,165.40 on April 25, 1933, and interest at the legal rate thereon to December 8, 1937, amounts to $9,277.01 making a total of $49,442.41. The difference between the two items is $23,628.97, which is the amount due the estate.

Under Section 15682 of the Compiled Laws of Michigan, it is the duty of this Court, acting as Commissioners of Claims, to enter judgment ascertaining and allowing the balance of the meritorious set-off which exceeds a claim. Since the Government has directly assumed this contractual obligation of the Fleet Corporation by the Federal Merchant Marine Act of 1936, it is the consequent duty of this Court to ascertain and allow this balance in favor of the estate unless, as claimed by the Government, this Court is without jurisdiction to grant such judgment for the reason given above. On this point an examination of the cases cited by the Government shows that they clearly support the proposition that no Court may enter an affirmative judgment against the United States on a counter claim exceeding a claim of the Government. However, all such cases have been overruled by United States v. The Thekla, 266 U. S. 328, where it was held that voluntary entry into litigation by the Government submits it to the Court's general jurisdiction to enter affirmative judgments on counter claims. This change in the law was expressly noted and followed by the Court of Appeals in United States v. National City Bank, 83 Fed. (2) 236; 106 A. L. R. 1235, which is the leading authority cited by the Michigan Supreme Court in the McLouth case, supra. This Court, there-

fore, concludes that the United States of America, having submitted to the jurisdiction of this Court, this Court retains jurisdiction, and

It is therefore ordered and adjudged that the claim of the United States of America as filed against said estate be and the same is hereby disallowed in accordance with the judgments of the Circuit Court and the Supreme Court.

It is further ordered, adjudged and ascertained, in accordance with Section 15682 of the Compiled Laws of the State of Michigan, that United States of America is indebted to said estate in the sum of $23,628.97 as of December 8, 1937, and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate by the United States of America.

Clair R. Black,
Judge of Probate.

NOTICE OF AND APPLICATION FOR APPEAL FROM ORDER, ENTERED DECEMBER 22, 1937, DISALLOWING CLAIM OF UNITED STATES OF AMERICA AND ADJUDGING THAT UNITED STATES OF AMERICA IS INDEBTED TO ESTATE OF SYDNEY C. McLOUTH, DECEASED, IN THE SUM OF $23,628.97.

(Filed January 31, 1938)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of
Sydney C. McLouth, Deceased.

Comes now United States of America, by John C. Lehr, United States Attorney, at the direction of the Attorney General of the United States, and hereby gives notice of and applies for an appeal from the order of said court, acting as Commissioners of Claims, entered December 22, 1937, whereby the claim of United States of America against the Estate of Sydney C. McLouth, Deceased, was disallowed and whereby it was adjudged that United States of America is indebted to said estate in the sum of $23,628.97 as of December 8, 1937.

As reasons for such appeal, United States of America assigns the following:

1. The court does not possess jurisdiction to entertain or adjudicate any claim against the United States, whether asserted by way of recoupment, set-off, counterclaim or cross-bill.

2. Even if the court possesses jurisdiction to adjudicate that the claim asserted by said estate may be applied pro tanto to extinguish the judgment claim of United States of America against said estate, the court does not possess jurisdiction to enter a judgment against the United States of America for any amount, even though the court ascertains and determines that the claim of said estate exceeds in amount the claim proved by United States of America.

3. The claim asserted by said estate is a claim against the United States Shipping Board Merchant Fleet Corporation (formerly United States Shipping Board Emergency Fleet Corporation) which was a corporation organized under the laws of the District of Columbia, and a claim against said Corporation may not be set off against a judgment obtained by United States of America in its own right.

4. The claim of said estate against the United States Shipping Board Merchant Fleet Corporation (formerly United States Shipping Board Emergency Fleet Corporation), if it has a valid claim, is an unliquidated claim for breach of contract and no evidence has been submitted to this court, acting as Commissioners of Claims, and there is no evidence in the records of this court to prove that the United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation) breached its contract nor that it is indebted to said estate in any sum whatsoever.

5. The decision of the Supreme Court of the United States in the case of Ingram-Day Lumber Company v. Sydney C. McLouth (275 U. S. 471), directing that a

judgment be entered against that defendant for $42,789.96, which judgment forms the basis of the counterclaim being asserted by said estate against United States of America in this proceedings, shows affirmatively that the claim sued upon by Ingram-Day Lumber Company arose out of a contract that was framed without reference to or knowledge of decedent's contract with the United States Shipping Board Emergency Fleet Corporation and that there was no proof that Ingram-Day Lumber Company's contract with decedent was either modified, suspended, cancelled or requisitioned by the United States Shipping Board Emergency Fleet Corporation or by United States of America, from which affirmative showing it necessarily follows that United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation) was under no contractual or other legal obligation to indemnify decedent McLouth or his said estate against the Ingram-Day Lumber Company judgment.

6. Even if the court possessed jurisdiction to make its order and even though the court did not err in determining that United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation) breached its contract, the court erred by including interest on the Ingram-Day Lumber Company judgment as a part of the damages for the supposed breach of contract, because the estate's cause of action (if any) against said Fleet Corporation accrued on January 3, 1928, when the United States Supreme Court directed a judgment against McLouth and it is inequitable that said Fleet

Corporation or the United States should be held liable for interest accumulated by reason of laches on the part of the Administrator.

United States of America.
By: John C. Lehr,
United States Attorney, and
By: Peter P. Gilbert,
Assistant United States Attorney.

Dated: January 29, 1938.

State of Michigan,
County of Wayne—ss.

Peter P. Gilbert being first duly sworn, deposes and says that he is an Assistant United States Attorney for the Eastern District of Michigan, and has charge of the claim of and is attorney for the United States of America, and is familiar with the issues involved in said claim, as set forth in the notice of and application for an appeal, and that the report of the Commissioner on Claims in this matter is not in accordance with the just rights of said appellant, as deponent verily believes.

Peter P. Gilbert.

Subscribed and sworn to before me this 29th day of January, A. D. 1938.

John W. Babcock,
Notary Public, Wayne County, Michigan.
My commission expires October 26, 1940.

BOND ON APPEAL FROM THE DECISION OF COMMISSIONER OF CLAIMS

(Filed.....)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of
Sydney C. McLouth, Deceased.

Know all men by these presents, that we, the United States of America by John C. Lehr, United States Attorney for the Eastern District of Michigan, as principal and Continental Casualty Company, an Indiana corporation, as surety, within the State of Michigan, are held and firmly bound and obliged unto John C. Shaw, Administrator of the Estate of Sydney C. McLouth, Deceased, being the adverse party; in the full sum two hundred ($200.00) dollars, lawful money of the United States of America, to be paid to the said John C. Shaw, Administrator of the Estate of Sydney C. McLouth, Deceased, or to his certain attorney, heirs, executors, administrators or assigns, to the true payment whereof we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals this 29th day of January, A. D. 1938.

The condition of this obligation is such, that if the above bounden, the United States of America, by John C. Lehr, United States Attorney for the Eastern District of Michigan, claimant against said estate, who has made and filed an application for an appeal to the Cir-

cuit Court for said county from the decision of the Commissioner appointed to receive, examine and adjust all claims and demands against said deceased, disallowing the claim of the United States of America against the Estate of Sydney C. McLouth, Deceased, and whereby it was adjudged that the United States of America is indebted to the said Estate of Sydney C. McLouth, Deceased, in the sum of twenty-three thousand, six hundred twenty-eight and 97/100 ($23,628.97) dollars, as of December 8, 1937, shall diligently prosecute said appeal to effect, and pay all damages and costs which may be awarded against the United States of America on such appeal, then this obligation to be void and of no effect, otherwise to remain in full force and virtue.

(Signed) John C. Lehr. L. S.

Continental Casualty Co.
By: U. A. Peters, L. S.
Attorney in fact.

I have examined and duly approve the foregoing bond this 31st day of January, A. D. 1938.

(Signed) Clair R. Black,
Judge of Probate.

ORDER ALLOWING APPEAL FROM DECISION OF COMMISSIONER ON CLAIMS

(Filed.....)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of Sydney C. McLouth, Deceased.

At a session of said court, held at the Probate Office in the City of Port Huron, in said county, on the 31st day of January, A. D. 1938.

Present: Honorable Clair R. Black, Judge of Probate.

The United States of America, by John C. Lehr, United States Attorney for the Eastern District of Michigan, and Peter P. Gilbert, Assistant United States Attorney for said district, having filed in this court a notice of and application for appeal to the Circuit Court for the said county from the report of the Commissioner on Claims filed December 22, 1937, whereby the claim of the United States of America against the Estate of Sydney C. McLouth, Deceased, was disallowed, and whereby it was adjudged that the United States of America is indebted to the Estate of Sydney C. McLouth, Deceased, in the sum of $23,628.97 as of December 8, 1937, and it appearing that the said appellant has given proper bond on such appeal, which has been duly approved and filed.

It is ordered that said appeal be, and the same is hereby allowed.

It is further ordered that notice of said appeal and hearing thereon in said Circuit Court be given by personal service of a certified copy of this order and application for appeal upon John C. Shaw, Administrator of said Estate, and upon Messrs. Stewart and Black, 407-9 First National Bank Building, Port Huron, Michigan, within fifteen (15) days from the date hereof.

(Signed) Clair R. Black,
Judge of Probate.

EXEMPLIFICATION OF RECORD

(Filed February 3, 1938)

STATE OF MICHIGAN—The Probate Court for the County of St. Clair.

In the Matter of the Estate of
Sydney C. McLouth, Deceased.

I, Mildred E. Wright, Registrar of the Probate Court for said County, do hereby certify that I have compared the foregoing copy of petition for allowance of balance due estate on set-off against U. S. claim notice of hearing, opinion and order, notice of appeal, bond on appeal, order granting appeal and directing notice, proof of service with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

In testimony whereof, I have hereto set my hand and affixed the seal of the Probate Court, at Port Huron, this 3rd day of February, A. D. 1938.

Mildred E. Wright,
(Seal) Registrar of the Probate Court.

CALENDAR PRAECIPE

(Filed February 4, 1938)

To Joseph E. Vincent, Clerk of said Court:

Appeal from the Probate Court of said County having been duly perfected herein, place the cause on the calendar of the present term of this court.

Yours, etc.,

Stewart & Black,
Attorneys for Appellee,
407-9 First National Bank Bldg.,
Port Huron, Michigan.

Dated: February 3, 1938.

To: John C. Lehr, United States District Attorney,
Peter P. Gilbert, Assistant U. S. District Attorney,
Attorneys for Appellant,
Detroit, Michigan.

Take notice that this cause has been placed on the calendar of the present term of the Circuit Court for the County of St. Clair in accordance with the foregoing praecipe, and that on the 9th day of February, 1938, at the opening of court on that date, the said appellee, through his counsel, will appear before the presiding judge of said court and move that hearing and trial of said appeal be set for a day certain subsequent to 14 days from the date hereof.

Yours, etc.,

Stewart & Black,
Attorneys for Appellee.

February 3, 1938.

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MICHIGAN

(Filed February 25, 1938)

Your petitioner, United States of America, appears specially by John C. Lehr, United States Attorney for the Eastern District of Michigan, and Peter P. Gilbert, Assistant United States Attorney for said district, at the direction of the Attorney General of the United States, for the sole purpose of filing this petition for removal, and for cause for removal of the above entitled suit from the Circuit Court for the County of St. Clair, State of Michigan, to the District Court of the United States for the Eastern District of Michigan, respectfully shows unto this Honorable Court:

1. Your petitioner is a corporation sovereign and is the defendant in the above entitled suit, which is of a civil nature, and the matter and amount in dispute in this suit exceed the sum or value of three thousand dollars, exclusive of interest and costs.

2. The said suit arises under the Constitution and laws of the United States, of which the district court of the United States are given original jurisdiction, that is, the suit arises under Section 8 of Article I, Section 2 of Article III, Article VI and the Seventh Amendment of the Constitution of the United States under the following statutes of the United States: Shipping Act, 1916 (39 Statutes at Large 728); Merchant Marine Act, 1920, (Ch. 250, 41 Statutes at Large 988); Merchant Marine Act, 1936, (Public No. 835—74th Congress); Shipping Fund Provisions, Act approved June 15, 1917,

(Ch. 29, 40 Statutes at Large 182); Section 3466 Revised Statutes. (Sec. 191, Title 31, U. S. Code); and Section 951, Revised Statutes, (Sec. 774, Title 28, U. S. Code).

3. The said suit is pending in this honorable court on your petitioner's appeal from an order entered by Honorable Clair R. Black, Judge of Probate for the County of St. Clair, Michigan, acting as Commissioners of Claims, under authority of Section 15682 of the Compiled Laws of Michigan, where, upon a petition filed by the attorney for John C. Shaw, Administrator de bonis non of the Estate of Sydney C. McLouth, Deceased, said Honorable Clair R. Black, Judge of Probate, acting as Commissioner of Claims, ordered, and adjudged that the claim of your petitioner against the said estate be disallowed and ordered, adjudged and ascertained that your petitioner is indebted to said estate in the sum of $23,628.97 as of December 8, 1937.

4. That said administrator, plaintiff-appellee herein, has filed no pleading in this honorable court setting forth his cause of action against your petitioner, but said administrator's petition filed in the Probate Court of St. Clair County, on which petition the Honorable Clair R. Black, Judge of Probate of said Court, acting as Commissioner on Claims, entered his order, as aforesaid, and which is contained in the transcript of record on appeal certified to this honorable court, alleged:

That on or about the 14th day of November, 1935, the said Probate Court, acting by statute in the place and stead of Commissioners on Claims, entered an order in this proceeding alleging as a claim of the third class, a claim of the United States of America against said estate in the sum of $40,165.40 plus interest thereon at

5% per annum from April 25, 1933, and disallowing the estate's pleaded set-off against said claim, which set-off was and is based upon said Probate Court's order of October 13, 1932, allowing in full the claim of Ingram Day Lumber Company in the sum of $58,089.04; that on or about the 8th day of February, 1937, by judgment on appeal of this honorable court the said order of said Probate Court of November 14, 1935, was duly reversed; that on or about September 1, 1937, by judgment on appeal of the Supreme Court of Michigan the said judgment of this Honorable Court was affirmed; that by said judgment on appeal in this honorable court the estate's set-off was adjudged to be a just and proper obligation owing to said estate by the United States Shipping Board Emergency Fleet Corporation, which corporation's name was changed to United States Shipping Board Merchant Fleet Corporation by Act of February 11, 1927, (46 U. S. Code 810) and as such it was a proper set-off to said claim of your petitioner; that it was the duty of the said Probate Court to ascertain and duly allow, in favor of said estate and against your petitioner, the balance in favor of said estate representing excess of such additional set-off against United States Shipping Board Merchant Fleet Corporation over and above said claim of your petitioner, "especially considering the provisions of the Federal Merchant Marine Act of 1936, by the terms of which all obligations of said Fleet Corporation were unequivocally assumed by said claimant United States of America." The said petition filed by the counsel for said administrator prayed that said Probate Court, acting in the place and stead of Commissioners on Claims, grant statutory judgment of allowance against your petitioner and in favor of said estate of the existing balance due said estate on account of its adjudicated

counter-cause of action, over and above said claim of your petitioner.

5. After said petition was filed by counsel for said administrator and before said order of said Honorable Clair R. Black, Judge of Probate, acting as Commissioners on Claims, was ordered thereon, your petitioner, acting through the United States Attorney for the Eastern District of Michigan, appeared and made seasonable objections to granting the relief against your petitioner prayed in the administrator's said petition, but said Honorable Clair R. Black, Judge of Probate, acting as Commissioners on Claims, overruled your petitioner's objections.

6. Your petitioner denies that it or the said Fleet Corporation is indebted to the plaintiff herein or to the Estate of Sydney C. McLouth, Deceased, in the sum of $23,628.97, or in any other sum, and states that the facts alleged in the administrator's said petition do not constitute a good cause of action against your petitioner, and your petitioner says that under the Constitution and laws of the United States, particularly the laws referred to in Paragraph 2 of this Petition, and under which this suit arises, your Petitioner has a good defense to plaintiff's suit.

7. Your petitioner's appeal from said order of said Honorable Clair R. Black, Judge of Probate, acting as Commissioners of Claims, was filed in this honorable court on the 31st day of January, 1938, and under the laws of the State of Michigan and the rules of, and practice in, this honorable court, your petitioner, on such appeal, is not required to file any plea, answer or demurrer, to said petition filed by the administrator as aforesaid, and at all events the filing of this petition for removal is within the time limited for filing a petition

for removal as prescribed in Title 28, Section 72, United States Code.

8. Your petitioner presents herewith a bond conditioned that it will enter into the District Court of the United States for the Eastern Disrict of Michigan, Southern Division, within thirty days from the date of the filing of this petition a certified copy of the record in this suit, and that it will pay all costs that may be awarded by the said District Court in case the said Court shall hold that this suit was wrongfully or improperly removed thereto.

9. That prior to the filing of this petition and of said bond for the removal of this cause, written notice of intention to file the same was given by your petitioner to Messrs. Stewart and Black, attorneys for the Estate of Sydney C. McLouth, as required by law, a true copy of which motion, with proof of service of the same, is attached hereto.

Wherefore, your petitioner prays that the said bond may be accepted as good and sufficient, and that this court will make its order for the removal of said cause to the United States District Court for the Eastern District of Michigan, Southern Division, and cause the Clerk of this Court to make up a record in said cause for transmission to said District Court, and that no other or further proceedings may be had or taken in said cause in this Court.

John C. Lehr,
United States Attorney.

(Sgd.) Peter P. Gilbert,
Assistant United States Attorney.

Oliver P. M. Brown,
Special Assistant United States Attorney.

(Sgd.) Max O'Rell Truitt,
General Counsel,
United States Maritime Commission,
Of Counsel.

Dated: February 24, 1938.

State of Michigan,
County of Wayne—ss.

On this 24th day of February, 1938, before me, a notary public in and for said county, personally appeared Peter P. Gilbert who signed the foregoing petition in my presence and who made oath that he has read same, that he knows the contents thereof; that the statements contained therein are true of his own knowledge; that he is an assistant United States Attorney for the Eastern District of Michigan, and is duly authorized to sign and verify said petition for and in behalf of the petitioner, and that he makes this affidavit for the reason that petitioner is a corporation sovereign.

Sally Montgomery,
Notary Public, St. Clair County, Michigan.
My commission expires May 20, 1939.

(Seal)

NOTICE OF HEARING

(Filed February 25, 1938)

To: Stewart and Black,
408 First National Bank Building,
Port Huron, Michigan,
Attorneys for the Estate of
Sydney C. McLouth, Deceased:

Please take notice that the United States of America, defendant herein, by John C. Lehr, United States Attorney for the Eastern District of Michigan, and Peter P. Gilbert, Assistant United States Attorney for said district, will, on Friday, February 23, 1938, at 9:30 o'clock in the forenoon, file in the above entitled court and cause its petition and bond for the removal of said cause from said court to the United States District Court for the Eastern District of Michigan, Southern Division, and will, at said time and place, or as soon thereafter as counsel may be heard, before Honorable Fred W. George, Circuit Judge, move said court for an order approving said petition and bond and removal of said cause to the United States District Court for the Eastern District of Michigan.

True copies of said petition, bond and proposed order are hereto attached.

John C. Lehr,
United States Attorney.
Peter P. Gilbert,
Assistant United States Attorney.

PROOF OF SERVICE BY MAIL

(Filed February 25, 1938)

United States of America,
Eastern District of Michigan—ss.

Gertrude Ogden being duly sworn, deposes and says that on the 21st day of February, A. D. 1938, she served true copies of the Petition for Removal, Bond for Removal, Order Removing Cause to United States District Court; and Notice of Hearing in the above entitled cause upon Messrs. Stewart and Black, 408 First National Bank Building, Port Huron, Michigan, attorneys for the Estate of Sydney C. McLouth, Deceased, by enclosing said true copies in an envelope, plainly addressed to the said attorneys, Messrs. Stewart and Black, 408 First National Bank Building, Port Huron, Michigan, postage thereon prepaid, and depositing the same in the United States mail chute in the Federal Building in the City of Detroit, Michigan.

Further deponent saith not.

Gertrude Ogden.

Subscribed and sworn to before me this 24th day of February, A. D. 1938.

John W. Babcock,
Notary Public, Wayne County, Michigan.
My commission expires October 26, 1940.

MOTION TO QUASH REMOVAL PETITION

(Filed February 25, 1938)

Comes now the said appellee, by Stewart & Black, his attorneys, and says that the petition for removal of this cause, as filed herein on February 23, 1938, is legally insufficient for the following reasons:

1. The petition is late, the cause having been tried in the Probate Court; reviewed and remanded by the Circuit Court (the judgment of which was duly affirmed by the Supreme Court); tried in the Probate Court on the issue left open for determination on remand; appealed by petitioner (appellant) to this Court from determination of such issue, and such last appeal having been duly placed upon the calendar and set for hearing in accordance with the provisions of Section 14256 of the Compiled Laws of 1929 of the State of Michigan;

2. The issue before the Court does not arise primarily under the Constitution or laws of the United States, but arises under a local statute, Section 15682 of the Compiled Laws of 1929 of the State of Michigan, and the voluntary submission by petitioner to the jurisdiction of said Probate Court by and through the filing and prosecution of its now disallowed claim against said estate;

3. The District Courts of the United States have never at any time had original jurisdiction to entertain a suit by said estate or its representatives upon the now adjudicated countercause of action of the estate against petitioner, and the question of

whether the estate is entitled to statutory allowance and ascertainment of the excess thereof over petitioners said claim is the only issue before this court for review;

and accordingly moves for entry of an order quashing the same.

This motion is based upon the files and records of this court and upon the opinion and judgment of the Supreme Court of Michigan as shown by Volume 281 of the Michigan Official Reports on pages 191 et seq.

(Signed) Stewart & Black,
Attorneys for Appellee,
Business Address:
407-9 First National Bk. Bldg.,
Port Huron, Michigan.

Dated: February 24, 1938.

TRANSCRIPT OF TESTIMONY

STATE OF MICHIGAN—In the Circuit Court for the County of St. Clair.

Before Hon. Fred W. George, Circuit Judge

In the Matter of the Estate of Sydney C. McLouth, Deceased. } No. 399-17.

February 25, 1938.
Port Huron, Michigan.

Appearances: Messrs. Brown and Gilbert, for the United States of America; Messrs. Stewart and Black, for the Estate:

Reported by Chester G. Holdefer, Official Reporter, 31st Judicial Circuit.

The Court: The Court is presented with two problems; the petition for removal to the District Court of the United States for Eastern Michigan, and also the question of continuance.

The Court is of the opinion, and finds, that the petition of the United States Government is insufficient on its face to warrant the Court in granting its petition for removal.

The next question for the Court's consideration is the question of the motion for continuance. This is an appeal from the Probate Court had some time ago. The case was set for hearing. The Court set aside other matters so that it could be heard today. The motion for continuance as stated by counsel for the government is for the purpose of taking depositions of one or more witnesses who live without the jurisdiction of this court. If that is the only purpose for continuance, the Court will grant it. If not, the Court will proceed with the trial.

Mr. Gilbert: Does your Honor have a copy of the transcript from the Probate Court, setting forth the reasons of the Court's decision?

The Court: Why, I have it here. "Notice of and application for appeal from order entered December 22, 1937, disallowing claim of United States of America and adjudging that the United States of America is indebted to Estate of Sydney C. McLouth, Deceased, in the sum of $23,628.97."—You do not need to take this, Mr. Reporter.

(The Court reads transcript indicated.)

Mr. Gilbert: Does your Honor also have the report of the Commissioner on Claims granting the estate relief to the extent of $23,000.00?

Mr. Black: That is the photographic portion of it, I believe, your Honor.

(The Court reads the Opinion and Order of the Probate Court.)

Mr. Gilbert: Now, we claim we have the right to go into every phase of the Commissioner's Report and to the case on appeal. The case Mr. Black cited, In Re Reid's Estate, reading the syllabus: (Mr. Gilbert reads citation.)

That is the point we are raising here. We have this point No. 4 raised in our reasons for appeal and that requires the taking of additional testimony or having a deposition taken. On that particular point we are entitled to a continuance because of the fact that your Honor has ruled against us in this transfer.

The Court: Of course, the Court did say that you had lots of time in which to take it, but I also said if those were your reasons and you want to take those depositions, and they are your only reasons, I would be glad to grant it.

Mr. Gilbert: There is no way I can answer that.

The Court: You have to have some reason for your motion for continuance, and if that is the real reason or only reason, I will grant you that continuance.

Mr. Brown: I might add to what Mr. Gilbert has said, that as soon as we took this appeal I started to try to find these witnesses whose testimony I wanted to produce either in this Court or the Federal Court, because whether we try it here or the Federal Court, we have to have this testimony. My only source of information was the old personal files and these men have been out of our service eighteen years, and I started to correspond with our representatives and it is only within the last three or four days I have been able to find where these men are. I haven't been able to interview them, and the reasons why we didn't go to the expense of bringing them here at tremendous expense was because we had no way of knowing what your Honor's ruling might be on our motion to remove. It would have been foolish for us to have brought witnesses here when we had the motion to remove, with the expectation that your Honor might grant, and that is the reason I am not ready to go to trial.

Now, as to whether I have any concealed reason; all I can say is that both Mr. Gilbert and myself are representatives of the Department of Justice. We are subject to the orders of our superiors, and what they may decide shall be done with this case after they are apprised with your Honor's refusal, we are not able to say. We have to get instructions, but certainly no harm can be done if a reasonable continuance is allowed and allow us to take depositions, because whether we use them in this court or the Federal Court, in any event we have to produce these witnesses who dealt with these

transactions at the time. I might say that one of the witnesses is the witness, Liebrand, who your Honor will recall wrote a letter in which he referred to the commitments to McLouth. The other is a man by the name of VanFleck, who is Assistant Adjuster. Now, both of those men have been located in New York City and I expect to take their testimony. I thought I might make the suggestion as to the length of continuance, I would suggest two weeks, at your Honor's convenience or whatever your Honor wants to set it.

Mr. Black: Your Honor, I have a plan that I think will take care of everybody's rights.

The Court: That's fine, let's have it.

Mr. Black: Mr. Brown refuses to meet your Honor's conditions to the continuance he asks for. Accordingly, I move that the Court take the testimony on the appeal at this time that I propose to offer. It won't take more than two or three minutes to do it; take the case under advisement with the understanding that Mr. Brown, if he wants to within thirty days from today, may move for a re-opening of the proof to put in these depositions he wants to put in, and they will be received, if he wants to make such a motion at that time. That takes care of counsel's desire to put in further proof and it will also stop this little game of getting a continuance, as I see it, for the purpose of getting an injunction.

Mr. Brown: You will recall when we were before your Honor before, we had the situation where Mr. Black wanted a continuance to get further proof from the Government at Washington, and after discussion we agreed that he should have a reasonable time. Meanwhile, the Court held the case open. Now, I have no objection to his putting the proof in and holding the case open until we come in, and limit us to a time, if

you like, but meantime the Court will not decide the issue until we have the opportunity to put in our proof.

Mr. Black: I might say that you cannot enjoin the Court itself, and all I want to do is to have this Court take the proof and take the case under advisement, and hold it open for a motion to re-open the proofs by you to submit this additional proof you want. I call that to particular attention that I want this Court to take the case under advisement right now so that an injunction cannot be administered, because counsel won't and cannot affect in any way procedure by this Court once the case is taken under advisement. In other words, I want to know that this continuance is not for the thing that I suspect. If that is not the purpose of it, counsel are taken care of.

Mr. Brown: We certainly object.

Mr. Black: Counsel are taken care of perfectly by my suggestion if they want to put further proof in, in good faith on the merits of this case. I think their point No. 4 has been adjudicated by the Supreme Court of Michigan, but if they have some further proof, relevant and competent to the issue, that is met.

The Court: You haven't any serious objection to that?

Mr. Brown: We object to the case being submitted. We say hold the case open and let them put on their proof and hold the case open until we have a chance to bring our testimony here and limit us as to time.

The Court: If you can tell me that you want this adjournment for those depositions and bring in further testimony, I will give you thirty days stay right now.

Mr. Brown: I have already stated I cannot give you any assurance.

The Court: I will adopt Mr. Black's suggestion. When you want to put in that testimony, all you have to do is make that motion to put in that testimony and I will grant it.

Mr. Brown: Well, all we can say is that we think it is an abuse of discretion to tell us to go to trial now.

The Court: I don't think so, the case has been open for a long while.

Mr. Brown: So far as we are concerned, we retire from the case since your Honor will not grant us the continuance we ask for.

The Court: I will grant you an opportunity to move to re-open the case. I don't think that is any hardship and it may be somewhat of a protection to the other side.

Mr. Black: Then I offer myself as a witness on the hearing of the appeal.

Mr. Brown: We formally object to going ahead with the case at this time in view of our motion for continuance and our statement to the Court that we want the continuance for the purpose of producing testimony of non-resident witnesses; we protest against the condition the Court imposes that we make some statement that we are not going to take any other action, which is something that is beyond our control as officials of the Government. And we respectfully ask the permission of the Court to retire from the case at this point.

OPINION, SUBSTANCE OF JUDGMENT AND STATEMENT OF REASONS THEREFOR

(Filed February 26, 1938)

This is an appeal from an order of the Probate Court ascertaining and allowing the balance of a set-off over and above a claim presented against the estate by appellant. The set-off was upheld in Re McLouth's Estate, 281 Mich. 191, and the case was remanded by this Court to the Probate Court for denial of the claim and for determination of the question whether the estate was entitled to affirmative order allowing the liquidated balance of its set-off.

The appeal was regularly placed on the calendar and set for hearing on February 25th, after due notice to appellant. On the date set for hearing appellant appeared by O. P. M. Brown, special counsel, and Peter P. Gilbert, Assistant United States Attorney, and presented a petition to remove the cause. After hearing argument thereon, the court denied the petition as insufficient, and appellant moved for a continuance. Although the specified reason for continuance was need for desired depositions, the court is satisfied that the motion was actually made in order to obtain time to file an injunction bill in the District Court against appellee to restrain him from proceeding further with this appeal. The Government attorneys were offered a thirty-day continuance if they would assure the court that the sole purpose of the continuance was as specified. They refused such assurance and the court ordered the hearing to proceed. Appellant's attorneys thereupon announced their withdrawal from the hearing and left the

court room, and appellee moved for affirmance of the appealed Probate Court order.

The action and announcement of appellant's attorneys must be taken as decision not to prosecute the appeal and the motion for affirmance is therefore granted and the clerk is directed to enter judgment accordingly. Lest my position be misunderstood, however, I advise the District Attorney that he will be allowed a re-opening of the proofs and a new trial if he cares to apply for same within thirty days. I do not want it said that any party has been denied full right to submit proof before me, but I will not grant such a continuance when convinced that the purpose of same is ulterior.

In going over the records of this court in the main case I find omission on my part that should be corrected. When the Probate Court originally allowed appellant's claim against the estate it perforce did not pass on the question whether the estate should receive an affirmative order, ascertaining the excess of its set-off above such claim. When this court reviewed the Probate Court's allowance of such claim, it could not in turn pass on such question, the function of this court being purely appellate in Probate cases. The judgment of this court actually rendered and intended in addition to the record thereof as it appears, and which it was this court's duty to enter as a matter of course, was that such question be determined on remand by the Probate Court, the court of original jurisdiction. I find, however, on going over my opinion and judgment, that I used the customary form of reversal of an order allowing a claim and inadvertently omitted direction to decide such question. The Probate Judge and all parties to the cause have treated the judgment as leaving the ques-

tion of affirmative relief open for decision by the Probate Court on remand and an amendment is probably unnecessary, since the record as it now stands does not purport to determine the question one way or the other. However, this case is apparently on another long journey through the courts and the record should therefore definitely show what was actually intended and done so that neither party hereafter be in a position to claim that this court's original judgment settled the question of affirmative determination one way or another. On its own motion, therefore, and in accordance with its inherent powers, this court will amend the record of its judgment, nunc pro tunc as of February 8, 1937, so that there is added thereto direction to the Probate Court to take such further order as law and justice require, including determination of the question whether the estate is entitled to statutory allowance of the excess of its set-off over and above the amount of the disallowed claim.

(Signed) Fred W. George,
Circuit Judge.

February 26, 1938.

ORDER OF COURT AS ENTERED ON JOURNAL FEBRUARY 28, 1938 AND SIGNED MARCH 1, 1938.

(Title of Court and Cause)

On motion of the court it is ordered and adjudged that the record of the judgment entered in this cause on February 8, 1937, be and the same is hereby amended nunc pro tunc as of February 8, 1937, so that there is added thereto direction to the Probate Court to take such further order as law and justice shall require, including determination of the question whether the estate is entitled to statutory allowance of the excess of its set-off over and above the amount of the disallowed claim.

Read, approved and signed in open court this 1st day of March, A. D. 1938.

Fred W. George,
Circuit Judge.

MOTION TO SET ASIDE OPINION PERTAINING TO NUNC PRO TUNC ORDER

(Filed March 29, 1938)

Now comes the United States of America by John C. Lehr, United States Attorney for the Eastern District of Michigan, and Peter P. Gilbert, Assistant United States Attorney for said district, and moves the court to set aside that portion of his opinion entered on February 26, 1938, pertaining to his nunc pro tunc order as of February 8, 1937, for the following reasons:

That the Court of his own motion amended the record of his judgment, nunc pro tunc as of February 8, 1937, so that there is added thereto direction to the Probate Court to take such further order as law and justice shall require, including determination of the question whether the estate is entitled to statutory allowance of the excess of its set-off over and above the amount of the disallowed claim.

That this Court was without jurisdiction to enter said order nunc pro tunc as of February 8, 1937, because:

1. The Court in said order is attempting to make it appear of record that the "suit" by the Administrator against the United States is only an incident of or supplement to the former proceedings in this court.

2. Section 13945 Compiled Laws of the State of Michigan for the year 1929, states that county circuit courts are required to hold at least four terms of court each year. In this cause several terms have intervened since the former order was entered on February 8, 1937. This Court, therefore, possesses no plenary jurisdiction over its former judgment and may make only such amendments as are permitted by the Michigan statute of amendments (Section 14148 et seq.).

3. Before the error in this cause could have been corrected, if it were susceptible of correction by amendment, it was necessary that the parties to be affected by it should have been cited before this court. It was also necessary that the parties affected by this order should have had an opportunity to be heard.

4. Because it was made after the term and without notice to the United States of America, it is clearly prejudicial to the interests of the United States.

5. In said opinion the Court stated that he "inadvertently omitted direction" to the Probate Court to decide the question of giving the Administrator a judgment for excess of the set-off over the Government's claim. This was in error because Mr. Black, counsel for Administrator, expressly disclaimed any right to an affirmative judgment against the United States (page 253, Printed Record). Mr. Black stated,

> "That set-off amounts to some $56,000 and of course, under the law we make no claim that we are entitled to an excess judgment against the government. We recognize that although our set-off, which we are pleading and submitting to the court here, exceeds the government's claim in this case, that all we can do is to extinguish the government's claim. In other words, although we might have twice as much coming on our set-off which the court might recognize, we concede all we can do is to apply enough of that set-off toward extinguishment of the government's claim. That appears to be the law and I concede it to be so, as I say."

In the Court's opinion of February 8, 1937, he stated,

> "Judgment will be entered on the date hereof reversing the order of the Probate Court and remanding the case to that court with direction to disallow the instant claim in full. The usual twenty day stay of proceedings pending appeal is granted."

This motion is based upon the files and records of said cause and upon the affidavit of Peter P. Gilbert hereto annexed.

John C. Lehr,
United States Attorney.
Peter P. Gilbert,
Assistant United States Attorney.

State of Michigan,
County of Wayne—ss.

Peter P. Gilbert being duly sworn, deposes and says that he is an Assistant United States Attorney for the Eastern District of Michigan, and is in charge, together with O. P. M. Brown of Washington, D. C., of said cause; that he has read the opinion of the Honorable Fred W. George, Circuit Judge for St. Clair County, dated February 26, 1938, in which opinion there is recited, "On its own motion, therefore, and in accordance with its inherent powers, this court will amend the record of its judgment, nunc pro tunc as of February 8, 1937, so that there is added thereto direction to the Probate Court to take such further order as law and justice shall require, including determination of the question whether the estate is entitled to statutory allowance of the excess of its set-off over and above the amount of the disallowed claim."

Deponent further states that he is familiar with Section 13945 Compiled Laws of the State of Michigan for the year 1929, which recites that county circuit courts are required to hold at least four terms of court each year.

Deponent further says that several terms of court have intervened since the order of February 8, 1937, was entered.

Deponent further says that he has read the Printed Record, especially page 253 in the Appeal from the Circuit Court to the Supreme Court of Michigan, in which counsel for the Administrator of said Estate, to-wit: Mr. Black, makes the following statement:

"That set-off amounts to some $56,000 and of course, under the law we make no claim that we are entitled to an excess judgment against the government. We recognize that although our set-off, which we are pleading and submitting to the court here, exceeds the government's claim in this case, that all we can do is to extinguish the government's claim. In other words, although we might have twice as much coming on our set-off which the court might recognize, we concede all we can do is to apply enough of that set-off toward extinguishment of the government's claim. That appears to be the law and I concede it to be so, as I say."

Deponent further says that he has read the opinion of this Honorable Court, in which he rendered his opinion against the claim of the Government, and has found that said opinion is concluded as follows:

"Judgment will be entered on the date hereof reversing the order of the Probate Court and remanding the case to that court with direction to disallow the instant claim in full. The usual twenty day stay of proceedings pending appeal is granted."

Deponent further says that he has examined the Michigan Supreme Court briefs, oral argument or opinion, and that the question as to an excess judgment against the United States does not appear to be present in this case.

Further deponent says not.

Peter P. Gilbert.

Subscribed and sworn to before me this 28th day of March, A. D. 1938.

John W. Babcock,
Notary Public, Wayne County, Michigan.
My commission expires October 26, 1940.

DECISION ON MOTION

(Filed October 18, 1938)

This is a motion by the United States to set aside an amendment of judgment made nunc pro tunc by the Court. The amendment which is attacked decided no issue and merely made definite record of an intended remand to the Probate Court, which that court had already carried out by disallowing a claim of the United States and by determining the question of whether the estate should receive statutory allowance of the excess of its set-off over the disallowed claim, and it is evidently objectionable only because of its fancied effect upon the government's petition for removal.

In its supporting brief the government says that this Court should not prolong the litigation by denying this motion—the asserted prolongation being threatened mandamus—, and I agree that all concerned should make every effort to expedite this aged conflict. The entire record has consequently been checked to determine what effect an order setting the amendment aside would have upon the substantial rights of the parties—I noted in my opinion of February 26th that the amendment was probably unnecessary—, and the answer has been fortunately supplied by the brief of government attorneys in support of this motion.

The amendment which the government wants set aside was made, quoting from my opinion of February 26th, "so that neither party be in position to claim that this court's original judgment (the one amended by the Court), settled the question of affirmative determination one way or another." In its brief, the government has conceded:

"There was no occasion to direct the Probate Court to consider an affirmative judgment against the United States. That could be and was done without this court's admonition."

It is likewise conceded in the same brief:

"This court then (February 8, 1937) remanded the proceeding to the St. Clair Probate Court for further proceedings not inconsistent with the said rulings of this Court and the Supreme Court."

Inasmuch as the government has so plainly conceded of record that the Probate Court on remand had the right and power, without explicit direction, to decide the issue whether the estate should receive an affirmative judgment for the excess owing it, the amendment now serves no necessary or vital purpose. If an order setting it aside will shorten this litigation, such order should certainly now be entered, since the concession amply protects the interests of the estate.

The clerk is therefore directed to enter an order on the Journal setting aside the order of February 28, 1938, that being the order which the government objects to.

Since their last brief will form a part of the record, the Court calls attention to an error attorneys for the government have made on page 7. Final judgment affirming this appeal was entered February 26, 1938, and notice of entry thereof was given all parties by the Court's opinion of the same date.

(Signed) Fred W. George,
Circuit Judge,
31st Judicial Circuit.

Dated: October 18, 1938,
Port Huron, Michigan.

ORDER AMENDMENT BE SET ASIDE

(Circuit Court Journal 27, page 556)

At a general term of the Circuit Court for the County of St. Clair, held at the Court House in the City of Port Huron, said County, on Tuesday, November 22nd, A. D. 1938.

Present: Honorable Fred W. George, Circuit Judge.

It appearing to the Court that the order amending judgment as entered on the journal February 28, 1938, and signed March 1, 1938, now serves no necessary or vital purpose in view of record concessions made by appellant United States, now, therefore, on motion of said appellant, it is adjudged that said order of amendment be and the same is hereby set aside.

Fred W. George,
Circuit Judge.

STATEMENT OF PROCEEDINGS AND FACTS

(Filed.....)

1. In October, 1933, the United States of America, filed a proof of claim for $40,165.40, with interest thereon from April 25, 1933, against the Estate of Sydney C. McLouth, Deceased, in the Probate Court for the County of St. Clair, where the Estate of said decedent was under administration, petitioned for allowance thereof and claimed priority in payment and to preference therefor, pursuant to Section 3466 Revised Statutes of the United States (Section 191, Title 31, U. S. C. A.)

2. The Administrator John C. Shaw and two creditors opposed allowance of the claim and asserted a set-off thereto, but on November 14, 1935, Honorable Clair R. Black, Judge of Probate of said County, acting as Commissioners of Claims, entered an order allowing the claim of the United States of America as a claim of the third class.

3. The administrator and the two creditors appealed from said order to the Circuit Court of said County and on February 8, 1937, Honorable Fred W. George, Circuit Judge of said County, entered a judgment reversing the order of said Probate Court and remanding the case to that Court with direction to disallow the claim of the United States.

4. The claimant United States of America appealed from the said judgment of said Circuit Court to this Court and on September 1, 1937, this Court affirmed the judgment of said Circuit Court (281 Michigan 191).

5. On November 20, 1937, John C. Shaw, administrator of said estate, filed a petition in the Probate Court of St. Clair County, in which the petitioner referred to the proceedings above recited and alleged:

> "That by such judgment of said Circuit Court the estate's set-off as pleaded against said claim was duly adjudged and adjudicated to be a just and proper obligation owing to said estate by United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation by Act of February 11, 1927, 46 U. S. C. A. 810), and as such that it was a proper set-off, within the meaning of Compiler's Section 15682 of the Michigan Compiled Laws of 1929, to said claim of United

States of America, and petitioner alleges that it is the consequent duty of this Court under said last mentioned statute to ascertain and duly allow, in favor of said estate and against said claimant United States of America, the balance in favor of said estate representing excess of such adjudicated set-off over and above such claim of United States of America, especially considering the provisions of the Federal Merchant Marine Act of 1936, by the terms of which all obligations of said Fleet Corporation were unequivocably assumed by said claimant United States of America."

The petition prayed:

"Considering the premises, petitioner prays that this Court, acting in the place and stead of Commissioners of Claims and in pursuance of the mandatory provisions of Compiler's Section 15682 of the Michigan Compiled Laws of 1929, grant statutory judgment of allowance against United States of America and in favor of said estate, of the existing balance due said estate on account of its adjudicated counter cause of action, over and above said claim of United States of America."

6. A copy of the foregoing petition was duly served on the United States Attorney for the District. The petition was duly brought to hearing and it was resisted by the United States on the sole ground that the Probate Court was without jurisdiction to grant an affirmative judgment against the government under the rule of United States v. Eckford, 73 U. S. 484, and similar cases. On December 22, 1937, Judge Black, acting as Commissioners on Claims, entered his "Opinion and Order" holding,—

"that United States of America is indebted to said estate in the sum of $23,628.97, as of December 8, 1937, and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate by the United States of America."

7. United States of America appealed from said judgment of allowance of the Estate's claim to the Circuit Court of St. Clair County and assigned the following reasons for the appeal:

(a) The court does not possess jurisdiction to entertain or adjudicate any claim against the United States, whether asserted by way of recoupment, set-off, counter-claim or cross-bill.

(b) Even if the court possess jurisdiction to adjudicate that the claim asserted by said Estate may be applied pro tanto to extinguish the judgment claim of United States of America against said Estate, the court does not possess jurisdiction to enter a judgment against United States of America for any amount, even though the court ascertains and determines that the claim of said Estate exceeds in amount the claim proved by United States of America.

(c) The claim asserted by said Estate is a claim against the United States Shipping Board Merchant Fleet Corporation (formerly United States Shipping Board Emergency Fleet Corporation) which was a corporation organized under the laws of the District of Columbia, and a claim against said Corporation may not be set-off against a judgment obtained by United States of America in its own right.

(d) The claim of said Estate against the United States Shipping Board Merchant Fleet Corporation (formerly United States Shipping Board Emergency Fleet Corporation), if it has a valid claim, is an unliquidated claim for breach of contract and no evidence has been submitted to this court, acting as Commissioner of Claims, and there is no evidence in the records of this court to prove that the United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation), breached its contract nor that it is indebted to said Estate in any sum whatsoever.

(e) The decision of the Supreme Court of the United States in the case of Ingram Day Lumber Company v. Sydney C. McLouth, (276 U. S. 471), directing that a judgment be entered against that defendant for $42,789.96, which judgment forms the basis of the counter-claim being asserted by said Estate against United States of America in this proceedings, shows affirmatively that the claim sued upon by Ingram Day Lumber Company arose out of a contract that was framed without reference to or knowledge of decedent's contract with the United States Shipping Board Emergency Fleet Corporation and that there was no proof that Ingram Day Lumber Company's contract with decedent was either modified, suspended, cancelled or requisitioned by the United States Shipping Board Emergency Fleet Corporation or by United States of America, from which affirmative showing it necessarily follows that United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant

Fleet Corporation) was under no contractural or other legal obligation to indemnify decedent McLouth or his said Estate against the Ingram Day Lumber Company judgment.

(f) Even if the court possessed jurisdiction to make its order and even though the court did not err in determining that United States Shipping Board Emergency Fleet Corporation (name changed to United States Shipping Board Merchant Fleet Corporation) breached its contract, the court erred by including interest on the Ingram Day Lumber Company judgment as a part of the damages for the supposed breach of contract, because the Estate's cause of action (if any) against said Fleet Corporation accrued on January 3, 1928, when the United States Supreme Court directed a judgment against McLouth and it is inequitable that said Fleet Corporation or the United States should be held liable for interest accumulated by reason of laches on the part of the Administrator.

At the instance of the attorneys for the Administrator of said Estate said appeal was calendared for hearing on February 25, 1938. On said date and before said hearing commenced, the attorneys for the United States of America presented in open court to Honorable Fred W. George, Circuit Judge of St. Clair County, a petition for removal of the proceeding to the United States District Court for the Eastern District of Michigan, together with a bond on removal and a draft of an order for removal and proof of service of said papers on the attorneys for the said Administrator. After said petition, bond and order were presented and it appeared

that the petition for removal would be opposed by the attorneys for the Administrator, the attorneys for the United States advised Judge George that if the Court did not approve the order for removal, the United States would not be ready to proceed with the trial of the case in his Court because of the absence of witnesses who were not residents of the County and State and that the United States of America would request a reasonable continuance of the case so that the depositions of such non-resident witnesses could be obtained to be used as evidence in the case.

8. Judge George announced from the bench that he denied the petition for removal and would deny the motion for continuance, unless the attorneys for the United States of America would give the court assurance that the government would not seek to enjoin the further prosecution of the case in the State Courts. The attorneys for the United States of America advised Judge George that they had no authority to give such assurance, but stated to the Court the request for continuance was made in good faith because they were taken by surprise through the Court's refusal to grant the petition for removal. Judge George then announced he would proceed with the case, whereupon the attorneys for the United States of America announced their retirement from the case and withdrew from the Court room.

9. As of February 26, 1938, Honorable Fred W. George filed his "Opinion, Substance of Judgment and Statement of Reasons Therefor" and a copy thereof was sent to the attorneys for the United States of America. Said Opinion, etc., read as follows:

"This is an appeal from an order of the Probate Court ascertaining and allowing the balance of a set-off over and above a claim presented against the estate by appellant. The set-off was upheld In re McLouth's Estate, 281 Mich. 191, and the case was remanded by this court to the Probate Court for denial of the claim and for determination of the question whether the estate was entitled to affirmative order allowing the liquidated balance of its set-off.

"The appeal was regularly placed on the calendar and set for hearing on February 25th, after due notice to appellant. On the date set for hearing appellant appeared by O. P. M. Brown, special counsel, and Peter P. Gilbert, Assistant United States Attorney, and presented a petition to remove the cause. After hearing argument thereon, the court denied the petition as insufficient, and appellant moved for a continuance. Although the specified reason for continuance was need for desired depositions, the court is satisfied that the motion was actually made in order to obtain time to file an injunction bill in the District Court against appellee to restrain him from proceeding further with this appeal. The Government attorneys were offered a thirty-day continuance if they would assure the court that the sole purpose of the continuance was as specified. They refused such assurance and the court ordered the hearing to proceed. Appellant's attorneys thereupon announced their withdrawal from the hearing and left the court room, and appellee moved for affirmance of the appealed Probate Court order.

"The action and announcement of appellant's attorneys must be taken as decision not to prosecute the appeal and the motion for affirmance is therefore granted and the clerk is directed to enter judgment accordingly. Lest my position be misunderstood, however, I advise the District Attorney that he will be allowed a re-opening of the proofs and a new trial if he cares to apply for same within thirty days. I do not want it said that any party has been denied full right to submit proof before me, but I will not grant such a continuance when convinced that the purpose of same is ulterior."

10. On March 15, 1938, due to the absence from the city of Peter P. Gilbert, Assistant United States Attorney, Assistant United States Attorney J. Thomas Smith telephoned to Joseph E. Vincent, Clerk of the Circuit Court of St. Clair County, to ascertain whether or not a judgment had been entered in said case and was informed by Mr. Vincent that no judgment had been entered and the office of the United States Attorney would be notified when it was finally entered. The fact was, however, that a judgment affirming the order of the Probate Court had been entered in the Journal of the Circuit Court but had not been entered in the Calendar of said Court, but this fact was not made known to the attorneys for the United States of America until November 15, 1938, at a conference with Judge George.

11. Meanwhile, on March 24, 1938, which was within the thirty days period the "Opinion", etc. of Judge George had allowed the United States of America for "re-opening of the proofs and a new trial," the United States of America filed in said suit in said Circuit Court, a motion to set aside a portion of the said "Opinion"

etc. filed by Judge George on February 26, 1938, in which nunc pro tunc he amended the record of his judgment in the former appeal proceedings, which had been affirmed by this Court (281 Mich. 191). After a delay due to Judge George's inability to hear the motion because of other judicial duties and assignments, the motion was submitted on briefs and without oral argument on or about October 10, 1938. On October 28, 1938, Circuit Judge George filed his "Decision on Motion", in which he granted the motion to set aside the nunc pro tunc amendment and in said "Decision" Judge George stated:

> "Since their last brief will form a part of the record, the Court calls attention to an error attorneys for the government have made therein on page 7. Final judgment affirming this appeal was entered February 26, 1938, and notice of entry thereof was given all parties by the Court's opinion of the same date."

12. The "error" in the government's brief to which Judge George referred was the following statement:

> "Since the Court has not entered a final judgment on this appeal affirming the order of the Probate Court, although this Court has signified its intention to affirm, it is suggested that this Court consider the significance of the statute above quoted and upon which the Administrator's right to affirmance must depend."

The statement in Judge George's "Opinion" etc. quoted in Paragraph 11 hereof was the first notice or intimation received by the attorneys for the United States of America that a "final" judgment had been

entered in the suit as of February 26, 1938. As hereinbefore stated, the attorneys for the United States of America did not know that the Journal of the Circuit Court contained an entry of the judgment, although the Calendar did not, until November 15, 1938, at a conference with Judge George for settlement of the order on the motion to set aside the nunc pro tunc amendment hereinabove mentioned.

13. The judgment of the Circuit Court of the County of St. Clair entered in the Journal of that Court and from which leave to appeal is now sought, is as follows:

"At a General Term of the Circuit Court for the County of St. Clair, held at the Courthouse in the City of Port Huron in said county, on Saturday, February 26, A. D. 1938.

"In re: The Estate of Sydney C. McLouth, deceased.

"United States of America, Appellant,
v. No. 399-17

"John C. Shaw, Administrator, etc., Appellee.

"On finding by the Court that appellant has failed to prosecute the appeal herein, and on motion of appellee, it is adjudged that the Probate Court order of December 22, 1937, be and the same is hereby affirmed.

"Thereupon Court adjourned until Monday morning, at 9:30 o'clock.

"Read, approved and signed in open Court this 28th day of February, A. D. 1938.

Fred W. George,
Circuit Judge."

CERTIFICATION

(Filed .....)

I do hereby certify that the foregoing is a concise statement of proceedings and facts as far as they are material to this case.

Fred W. George,
Circuit Judge.

Dated at .....

.....1938

CLAIM OF APPEAL

(Filed February 18, 1939)

The United States of America claims an appeal from the judgment entered on February 28, 1938, by Honorable Fred W. George, Circuit Judge for the County of St. Clair, affirming a judgment for $23,628.97, in favor of the Estate of Sydney C. McLouth, Deceased, against the United States of America, entered on December 22, 1937, by the Honorable Clair R. Black, Judge of Probate of the County of St. Clair.

Appellant takes a general appeal pursuant to leave obtained as shown by order of the Supreme Court dated February 2, 1939, allowing this appeal.

United States of America.
By: John C. Lehr,
United States Attorney.
By: Peter P. Gilbert,
Assistant United States Attorney.
By: Oliver P. M. Brown,
Special Assistant United States Attorney.

Dated: February 15, 1939.

NOTICE OF FILING OF CLAIM OF APPEAL

(Filed February 18, 1939)

To: Messrs. Stewart and Black,
Attorneys for the Appellee.

Please take notice that the Claim of Appeal, of which annexed is a copy, was filed in the Office of the Clerk of St. Clair County on February 17, 1939, and that the filing fee of five dollars ($5.00) has been paid.

Peter P. Gilbert,
of Counsel for Appellant.

Dated: February 17, A. D. 1939.

PROOF OF SERVICE

(Filed February 18, 1939)

State of Michigan,
County of Wayne—ss.

Peter P. Gilbert, being first duly sworn, deposes and says that he did serve the claim of appeal and notice, of which annexed are copies, upon Messrs. Stewart and Black, Attorneys for the appellee, by inclosing same in sealed envelope addressed to Messrs. Stewart and Black, Attorneys at Law, 407 First National Bank Building, Port Huron, Michigan, with deponent's return address placed in the upper left hand corner, and by depositing said envelope with said claim of appeal and notice inclosed therein and with postage fully prepaid in the United States Post Office at Detroit, Michigan, on February 17, 1939.

And further deponent sayeth not.

Peter P. Gilbert.

Subscribed and sworn to before me this 17th day of February, A. D. 1939.

John C. Ray,
Notary Public, Wayne County, Michigan.
My commission expires March 3, 1941.

ORDER FOR REMAND

(Filed .....)

At a session of said court held in the Federal Building at Detroit, Michigan, this 21st day of February, A. D. 1939.

Present: Hon. Arthur F. Lederle, District Judge.

The motion to remand filed on behalf of John C. Shaw, Administrator de bonis non of the Estate of Sydney C. McLouth, Deceased, appellee above named, having come on to be heard, and the court being fully advised in the premises,

It is ordered that the said motion to remand be, and the same is hereby granted, and the above entitled cause is hereby remanded from this court to the Circuit Court for the County of St. Clair, Michigan.

Arthur F. Lederle,
District Judge.

CERTIFICATE OF CIRCUIT JUDGE

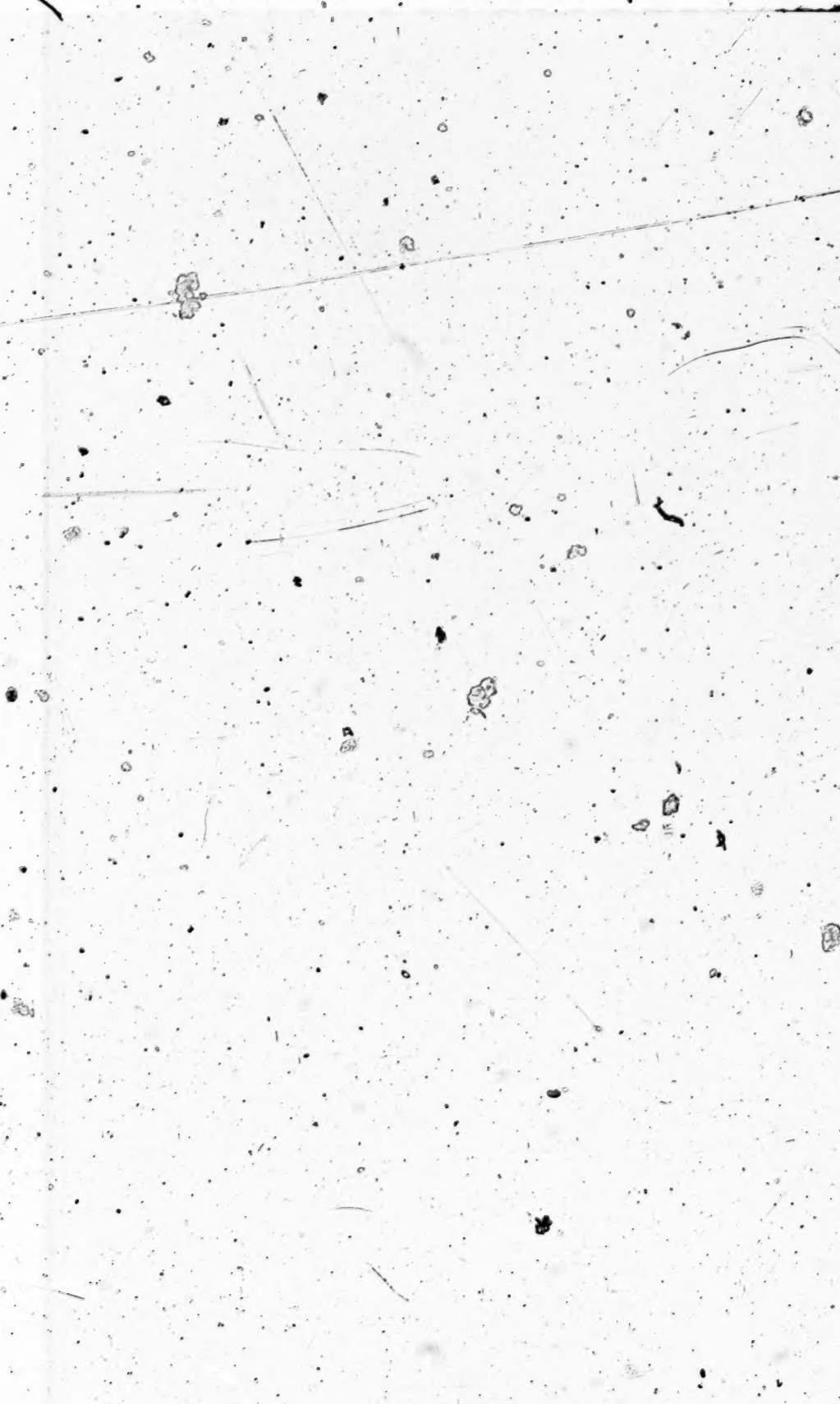
(Filed March 10, 1939)

I, Fred W. George, Circuit Judge in and for the County of St. Clair, State of Michigan, certify that, pursuant to the statute and court rules in such case made and provided, I have settled and signed the foregoing record, containing the material pleadings and other proceedings in said cause, and I certify that the foregoing contains substantially all of the necessary material pleadings, orders and other proceedings for a review by the Supreme Court of the questions of law and fact involved.

I further certify that, on motion duly made and consented to by counsel, the time for filing the record has been extended to March 11, 1939.

Fred W. George,
Circuit Judge.

Dated: March 10, 1939.



40443

PARTIES IN THE MATTER OF THE ESTATE OF SYDNEY C. MCLOUTH, DECEASED

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN C. SHAW, ADMINISTRATOR, APPELLEE

Appeal from St. Clair

1939

Plaintiff's attorneys, John C. Lehr, Peter P. Gilbert.
Defendant's attorneys, Stewart and Black.

Jan. 30—Application for delayed appeal filed.
Feb. 2—Application granted.
Mar. 13—Note of argument filed.
" 30—Record on appeal filed.
Apr. 11—Continued.
" 17—Note of argument filed.
May 31—Probate Court calendar entries filed.
" 19—Motion to include record in former case filed.
" 22—Brief in opposition filed.
June 1—Motion to strike brief filed.
" 7—Motion submitted with principal case (to include record).
" 8—Motion denied (to include record).
" "—Argued and submitted.
" 24—Certified copy of Probate Court order filed.
Sept. 5—Motion to strike brief denied.
" "—Affirmed, costs, remanded.
" 20—Record returned to Court below.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the second day of February, in the year of our Lord one thousand nine hundred and thirty-nine.

Present the Honorable HENRY M. BUTZEL, Chief Justice; HOWARD WIEST, GEORGE E. BUSHNELL, EDWARD M. SHARPE, WILLIAM W. POTTER, BERT D. CHANDLER, WALTER H. NORTH, THOMAS F. MCALLISTER, Associate Justices.

40443

IN THE MATTER OF THE ESTATE OF SYDNEY C. MCLOUTH, DECEASED

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN C. SHAW, ADMINISTRATOR, APPELLEE

In this cause an application is filed by appellant for leave to appeal from the judgment of the Circuit Court for the County of St. Clair, and nothing in opposition thereto having been filed by appellee and

due consideration thereof having been had by the Court, It is ordered that the application be and the same is hereby granted.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the eighth day of June, in the year of our Lord one thousand nine hundred and thirty-nine.

Present the Honorable HENRY M. BUTZEL, Chief Justice; HOWARD WIEST, GEORGE E. BUSHNELL, EDWARD M. SHARPE, WILLIAM W. POTTER, BERT D. CHANDLER, WALTER H. NORTH, THOMAS F. MCALLISTER, Associate Justices.

40443.

UNITED STATES OF AMERICA
vs.
JOHN C. SHAW, ADM'R.

This cause coming on to be heard is argued by Mr. Brown for the appellant and by Mr. Black for the appellee and is duly submitted.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the eighth day of June, in the year of our Lord one thousand nine hundred and thirty-nine.

Present the Honorable HENRY M. BUTZEL, Chief Justice; HOWARD WIEST, GEORGE E. BUSHNELL, EDWARD M. SHARPE, WILLIAM W. POTTER, BERT D. CHANDLER, WALTER H. NORTH, THOMAS F. MCALLISTER, Associate Justices.

40443

IN THE MATTER OF ESTATE OF MCLOUTH

In this cause a motion is filed by appellant for permission to file in connection with this appeal a copy of the printed record in Calendar No. 39487, and a brief in opposition thereto having been filed by appellee, and due consideration thereof having been had by the Court, it is ordered that the motion be and the same is hereby denied.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifth day of September, in the year of our Lord one thousand nine hundred and thirty-nine.

Present the Honorable HENRY M. BUTZEL, Chief Justice; HOWARD WIEST, GEORGE E. BUSHNELL, EDWARD M. SHARPE, WILLIAM W. POTTER, BERT D. CHANDLER, WALTER H. NORTH, THOMAS F. MCALLISTER, Associate Justices.

40443

IN THE MATTER OF THE ESTATE OF SYDNEY C. McLOUTH, DECEASED

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN C. SHAW, ADMINISTRATOR, APPELLEE

In this cause a motion is filed by appellant to strike the brief heretofore filed herein by appellee opposing motion for diminution of record, and papers in opposition thereto having been filed by appellee, and due consideration thereof having been had by the Court, it is ordered that the motion be and the same is hereby denied.

State of Michigan Supreme Court

IN RE THE ESTATE OF SYDNEY C. McLOUTH, DECEASED

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN C. SHAW, ADMINISTRATOR DE BONIS NON OF ESTATE OF SYDNEY C. McLOUTH, DECEASED, APPELLEE

Before the Entire Bench

NORTH, J. Except as hereinafter noted the factual background of this case will be found in Re McLouth's Estate, 281 Mich. 191, hereinafter referred to as a former appeal in this litigation. From the facts there stated it appears a claim against the McLouth estate in favor of the Ingram-Day Lumber Company was finally reduced to judgment in the supreme court of the United States: Ingram-Day Lumber Co. v. McLouth, 275 U. S. 471. The date of this judgment was January 3, 1928. Pending this litigation in the federal court, McLouth had died in 1923. With accrued interest and costs the adjudicated claim was ultimately allowed in the probate court of St. Clair County against the McLouth estate in the sum of $58,089.04. For reasons noted in our former decision and because of an act of Congress (Merchant Marine Act, 49 Stat. 1987; U. S. C., Title 46, Sec. 1113; quoted in margin hereof) appellee herein asserts that the United States government as an assignee or successor to all the rights and liabilities of the United States Shipping Board Emergency Fleet Corporation (herein designated as the Fleet Corporation) is obliged to reimburse or indemnify the McLouth estate as to its liability on this $58,089.04 claim. At the outset we may note, as held on the former appeal, we are of the opinion that appellee's contention in this particular is sound.

Another claim against the McLouth estate in the amount of $40,165.48 in favor of the United States Government was reduced to judgment in the federal courts. Shaw v. United States, 75 Fed. (2d) 175. This adjudicated liability was also filed as a claim in the St. Clair probate court proceedings in the McLouth estate. Later the administrator of the estate succeeded in establishing his contention of right to satisfy this latter liability of the estate by having it set off or allowed pro tanto against the government's liability to reimburse the estate for the Ingram-Day Lumber Co. claim of $58,089.04. This was the controversy decided in Re McLouth Estate, supra.

After our former decision the administrator, on November 20, 1937, petitioned the probate judge, acting in the place of commissioners on claims, for the ascertainment and allowance of the excess of the Ingram-Day Lumber Company claim over and above the government's claim as a claim in favor of the McLouth estate and against the United States Government. The uncontroverted difference in amount between these claims, allowance being made for accrued interest, is $23,628.97. By reason of the above-noted judgments, as embodied in this record, the amount of the damage to the estate was fixed or liquidated in case of failure of performance of the indemnity settlement agreement, (outlined in our former decision) which failure is shown to have occurred. From the probate court's order granting the administrator's petition and allowing this claim in the amount of $23,628.97 as of December 8, 1937, in favor of the estate, the government appealed to the circuit court, on hearing in the circuit court the allowance of the claim was affirmed; although this result instead of being reached after a full hearing on the merits was reached because of a seeming abandonment of the proceedings in the circuit court by the government's representatives. From the judgment entered in the circuit court the government has brought the instant appeal. As stated in appellant's brief:

"But a new question is presented on this appeal, namely, whether the Probate Judge, acting as Commissioners of Claims, possessed jurisdiction to allow an affirmative judgment against this Appellant—a question that was not presented on the former appeal (i. e., the appeal in Re McLouth Estate, supra).

"Appellant's challenge to the jurisdiction of the Probate Judge rests not alone upon the immunity of the sovereign, but also rests upon the contention that the same statute that created the right to apply a set-off in favor of the Estate and provided the remedy, also imposed a condition which affected the existence of the right and prohibited the special tribunal in which the right might be asserted from giving any consideration to a set-off which was invalidated by the condition imposed, i. e., if the set-off was barred by the Michigan Statute of Limitations. This last contention might have been but was not raised on the former appeal."

At the oral argument appellant definitely took the position that the only questions presented by this appeal are:

I. Did the probate court have jurisdiction to allow the claim of $23,628.97 in favor of the estate and against the government?

II. As to this claim, has there been due process of law so that the government is bound by the adjudication?

It is appellant's contention that each of these questions should be answered in the negative.

In presenting its contention that the probate court was without jurisdiction to allow the claim of $23,628.97 against the government, appellant in its brief has framed the issue as follows:

"Since decedent's claim against the Emergency Fleet Corporation for breach of contract accrued to decedent or to decedent's estate more than six years prior to the date decedent's administrator exhibited said claim in off-set to the claim of appellant against the estate and hence was barred by limitations (Section 13976, Compiled Laws of Michigan, 1929) did the Probate Judge acting either as Commissioners of Claims or as a Probate Court, possess jurisdiction to allow the claim exhibited in favor of the estate, as a set-off or otherwise, in view of the prohibition in Section 15682 (Compiled Laws of Michigan, 1929) against allowance of any claim barred by the statute of limitations?"

We quote the statute under which the probate court asserted its jurisdictional right to adjudicate the issue.

"When a creditor against whom the deceased had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be; *but no claim barred by the statute of limitations shall be allowed by the commissioners in favor of or against the estate, as set-off or otherwise.*" C. L. 1929, Sec. 15, 682; Stat. Ann. 27.2829.

Jurisdiction

The issue as to jurisdiction is presented by the italicized portion of the above-quoted statute. Appellant contends that (1) since its obligation to pay the Ingram-Day Lumber Company claim had outlawed, the probate court, acting solely under authority of the statute just quoted, was without jurisdiction to render judgment in favor of the estate; and (2) that the question of jurisdiction may be raised at any time pending final adjudication. As to the first of the above contentions appellant cites Davis v. Mills, 194 U. S. 451, Texas Cement Co. v. McCord, 233 U. S. 157 and numerous other cases. The proposition is this:

If a statute creating a new right of action contains within itself limitation of jurisdiction over subject matter or express limitation of time within which the new right of action must be presented, failure of compliance with such limitation defeats the right of action.

It is true that the quoted statute vests commissioners on claims with power to adjudicate set-offs, which power would not exist except

for the statutory provision; but subjecting and limiting the exercise of this power by mere reference to our general statute of limitations, which is commonly applicable to all courts, did not add to or constitute in the statute a jurisdictional element. This provision only specifies that commissioners on claims in deciding set-off issues, like our courts, are governed by the provisions of our general statute of limitations. Without this directory provision the operation of the statute would have been the same. A like provision is not contained in the statutory provisions for general hearing of claims by commissioners, but nonetheless a claim barred by the statute cannot be allowed by commissioners. A special or distinct limitation of time for asserting a set-off before commissioners is not embodied in this statute; such, for example, as the express limitation of two years for bringing a statutory action under the blue sky law. See Bigelow v. Otis, 247 Mich. 409.

"A positive distinction seems to be made between cases in which the limitation of time for bringing suit is contained in the statute which creates the liability and right of action and general statutes of limitations of rights of action existing under other statutes or under the common law." Bement v. Grand Rapids, Etc., R. Co. 194 Mich. 64, 68.

We think it follows that appellant can claim in this proceeding the benefit of the statute of limitations, if at all, only in the same sense it might in an ordinary law suit.

Defense of the Statute of Limitations. Except as incident to its challenge to the jurisdiction of the probate court, we do not understand that appellant in this appeal relies upon the statute of limitations as a defense to the estate's claim. Nor could it do so. Such a claim was not made in the probate court so far as disclosed by this record and it was not assigned as a reason in support of the appeal to the circuit court. It cannot now be injected as an issue on appeal to this court. The proceedings now before us originated in the probate court, having been instituted in that tribunal by appellant. When litigation instituted in the probate court is taken by appeal or certification to the circuit court, the latter court exercises appellate jurisdiction only and is restricted to the issues presented by reasons assigned in support of the appeal. C. L. 1929 Sec. 15. 958; Stat. Ann. 27.3158. In Re Beers, 148 Mich. 300; In Re Ward's Estate, 152 Mich. 218; In Re DeHaan's Estate, 169 Mich. 146; In Re Broffee's Estate, 206 Mich. 107; In Re Murphy's Estate, 219 Mich. 70; In Re Reid's Estate, 248 Mich. 860. If there was any objection to the estate's counterclaim growing out of the statute of limitations it should have been raised before the commissioners or on the appeal to the circuit court. Slaughin v. Hooper, 40 Mich. 503; Andrews v. Osborn, 159 Mich. 77.

It follows that the question of the effect of the statute of limitations, if any, on the controversy brought to us by this appeal is not open to consideration.

Jurisdiction to Render Affirmative Judgment—Sovereign Immunity. As a second challenge to the jurisdiction of the probate court and the circuit court, appellant asserts:

"The probate judge did not possess jurisdiction to enter an affirmative money judgment against this appellant."

This contention is based upon the assertion of the government's sovereign immunity from suits in state and federal courts. We quote from appellant's brief:

"The United States cannot be sued in any court, Federal or State, without express authority of Congress, and when it consents to be sued the act is jurisdictional and must be strictly followed (U. S. v. Pfitsch, 256 U. S. 547). 'Its immunity recognizes no distinction between cross bills and original bills, or between ancillary suits and original suits, but extends to suits of every class (Ill. Cent. R. R. Co. v. Public Utilities Comm., 245 U. S. 493). There is no difference between recoupment, counterclaim, and set-off so far as invoking jurisdiction is concerned (Merchants Heat & L. Co. v. Clow & Sons, 204 U. S. 286)."

There is some seeming conflict in federal decisions as to jurisdiction of state or federal courts to render affirmative judgments against the government in suits wherein the government has voluntarily appeared. Appellant cites Illinois Cent. R. R. Co. v. Public Utilities Comm., 245 U. S. 493, and quotes the following:

"No doubt there are situations in which a cross bill against an ordinary suitor may be considered and dealt with in virtue of the jurisdiction over the principal suit, even though as an original bill it could not be entertained (see Denver v. New York Trust Co., 229 U. S. 123, 135, and cases cited); but it is otherwise where the cross bill is against the United States, for no suit against it can be brought without its consent given by law. Its immunity recognizes no distinction between cross bills and original bills, or between ancillary suits and original suits, but extends to suits of every class." (Citing numerous cases.)

But the applicability of the above quotation to the instant suit is seriously impaired, if not wholly nullified, by the fact that the United States was not originally a party to the Illinois Central Railroad Company case; but instead an unsuccessful attempt was made to interplead the United States. The instant case is decidedly different in that the government has voluntarily brought its claim into the state courts. A like distinguishing feature exists in the recent federal case cited in appellant's reply brief. United States v. State of Minnesota, 305 U. S. 382. In this suit the government was made a party defendant. It was not a voluntary party; but instead it appeared specially in the federal court and moved to dismiss on the ground that it had not consented to be sued. Its motion was granted.

In others of the cases cited by appellant affirmative judgment against the government based on set-off or counterclaim was denied because of controlling statutory provisions which restricted the juris-

diction of the forum in which suit was brought. See United States v. Nipissing Mines Co., 206 Fed. 431. We forego specifically pointing out the quite obvious inapplicability of numerous federal decisions cited by appellant because of our understanding that the more recent federal decisions hold adversely to appellant's contention that state or federal courts do not have jurisdiction to render affirmative judgments against the United States, even in cases to which the government has voluntarily made itself a party. In the instant controversy the government as the moving party voluntarily appeared in the probate court and asserted a claim for upwards of $40,000 against the McLouth estate. It is now faced with a counterclaim in the same proceedings. On the former appeal Mr. Justice Butzel, speaking for the Court, said:

"The tendency of the United States Supreme Court is to allow a set-off against the government when the latter brings suit." In re McLouth's Estate, supra.

The following from American Propeller & Manfg. Co. v. United States, 300 U. S. 475; 57 Sup. Ct. 521, was quoted in our decision of the former appeal:

"We have said (United States v. The Thekla, 266 U. S. 328, 339-341 (45 Sup. Ct. 112).): 'When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it. * * * the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest.' If the principle thus stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

Also in deciding the former appeal we cited and quoted from United States v. National City Bank of New York, 83 Fed. (2d) 236; 106 A. L. R. 1235. Following this decision by the circuit court of appeals, the federal supreme court denied certiorari (see 299 U. S. 563). The decision is so controlling in the instant appeal that we again quote from it herein:

"The next question is whether sovereign immunity from suit bars this set-off. Set-offs against the sovereign United States have been allowed where it was plaintiff. United States v. Wilkins, 6 Wheat. (19 U. S.) 135; United States v. MacDaniel, 7 Pet. (32 U. S.) 1; United States v. Kimball, 101 U. S. 726; United States v. Ringgold, 8 Pet. (33 U. S.) 150. The supreme court has held, independently of any statute, that, where the sovereign brings a suit, it submits to the application of the same principles which govern private suitors. The Paquete Habana, 189 U. S. 453 (23 Sup. Ct. 593); The Nuestra Senora de Regla, 108 U. S. 92 (2 Sup. Ct. 287); The Siren, 7 Wall. (74 U. S.) 152. In The Siren, supra, the principle of a

sovereign plaintiff's submission to jurisdiction was held subject to the qualification that no affirmative judgment could be entered, but in The Nuestra Senora Case, supra, an affirmative judgment against a sovereign was upheld, and the previous qualification of the right against the government was removed. This was followed in 1902 in The Paquete Habana, supra, and later reaffirmed in United States v. The Thekla, 266 U. S. 328 (45 Sup. Ct. 112).

"If a sovereign state goes into court seeking its assistance, it is in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction in respect to a set-off or counterclaim properly assertable as a defense in a similar suit between private litigants. The Gloria, 286 Fed. 188. See French Republic v. Inland Navigation Co., 263 Fed. 410, 411. Where a sovereign voluntarily litigates, he must play the role of a litigant like any other suitor and abide by the consequences. See Richardson v. Fajardo Sugar Co., 241 U. S. 44 (36 Sup. Ct. 476); People of Porto Rico v. Ramos, 232 U. S. 627 (34 Sup. Ct. 461); Clark v. Barnard, 108 U. S. 436, 447, 448 (2 Sup. Ct. 878). It is now established that, where a sovereign comes into court, he is unarmed with immunity as against the rights of a defendant who has a proper set-off to his claim."

In its still more recent decision the supreme court of the United States has said:

"By voluntarily appearing in the role of suitor it [a foreign sovereign] abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. United States v. The Thekla, 266 U. S. 328, 340, 341; United States v. Stinson, 197 U. S. 200, 205; The Davis, 10 Wall. 15; The Siren, 7 Wall. 152, 159." Guaranty Trust Co. v. United States, 304 U. S. 126, 134.

The extent to which the federal supreme court by its recent decisions has indicated a proneness to minimize or restrict sovereign immunity from suit is strikingly disclosed by its very recent decision in Keifer and Keifer v. Reconstruction Finance Corp., decided February 27, 1939. See United States Supreme Court Advance Opinions, Vol. 83, Pg. 512.

In the light of the above cited decisions, appellant's contention that the probate court did not possess jurisdiction to enter an affirmative judgment against it is not tenable. We are not in accord with appellant's contention that the law as announced in the above cited cases should be confined in its application to proceedings in admiralty. Neither the context of the decisions nor the reasoning therein employed justifies appellant's contention. It may be noted that neither the American Propeller Company case, nor the National City Bank case, nor the Guaranty Trust Company case, from each of which we have just above quoted, involves an admiralty controversy.

"There is no difference between a libel in rem, under which a ship is arrested, and an action in personam against an agent of the sovereign." Kunglig Jarnvagastyrelsen v. Dexter & Carpenter, 300 Fed. 891.

On the question of jurisdiction we conclude that since the United States of its own volition submitted its claim against the McLouth estate to the courts of this state, its status as a litigant here is no different than that of an individual who has submitted to the jurisdiction of our state courts. In the exercise of jurisdiction thus acquired, sovereign immunity is properly disregarded; and as to the asserted counterclaim the court had full power to make final determination of the rights of the litigants including power to render affirmative judgment against the federal government. That the State court may be powerless to enforce its judgment against the United States by execution is beside the question as to the court's jurisdiction as a final arbiter of the parties' rights. United States v. Eckford, 73 U. S. 484. Appellee's position as to this phase of the case is stated in its brief as follows:

"Appellee does not claim that this judicial determination by the probate court constitutes a judgment against the Fleet Corporation within the meaning of the last sentence of Sec. 203, 49 Stat. 1987 (46 U. S. C. A. Sec. 1113). The probate court's order is a judicial ascertainment that, on striking a balance of proper demands, the United States as claimant is indebted to the estate (a result and determination which is permitted and dictated by the Eckford case (73 U. S. 484) as well as by our probate court set-off statute), and the adjudicated obligation must consequently be paid, if at all, by special congressional act."

Was There Lack of Due Process? Appellant further contends that the judgment for $23,628.97 entered in the probate court and affirmed on appeal to the circuit court of St. Clair county violated the due process clauses of the state and federal constitutions. The basis of this contention is that this affirmative judgment in favor of the McLouth estate arises out of the contractual obligation of the Fleet Corporation, not out of any commitment of the United States; and appellant asserts there has never been an adjudication in any forum fixing the liability of the Fleet Corporation or the United States for this contractual undertaking of the corporation or for the breach thereof. But this contention is not tenable. In the earlier proceedings between these parties which went to final adjudication on the former appeal to this court, it was determined that the government had placed itself in the shoes of the Fleet Corporation. Throughout the transactions giving rise to this litigation the government has been the principal and the Fleet Corporation merely its self-created agency. It now appears that by voluntary congressional action (Merchant Marine Act, 49 Stat. 1987; U. S. C., Title 46, Sec. 1113) the United States dissolved the Fleet Corporation, took over all of its assets, and assumed its liabilities. That appellant is

liable for the undertakings of the Fleet Corporation embodied in its indemnifying contract with McLouth, was adjudicated on the former appeal. This determination was essential to decision of that appeal.

By reason of our former decision, such is now the law of this case. It is in the proceedings had in the courts of this state, to which the government became a voluntary party, that the government has had its day in court. The adjudication adverse to the government was in a proceeding provided by the statute in this state (C. L. 1929, Sec. 15682; Stat. Ann. 27.2829). The adjudicating tribunal had power to hear and determine unliquidated claims. Willard v. Fralick, 31 Mich. 431; Ford v. Maney Est., 251 Mich. 461; In Re Oldman's Estate, 264 Mich. 32. Hence there was full compliance with the due process requirements of both the state and federal constitutions.

Decision herein is only as to the right of appellee to an affirmative judgment fixing the amount of the excess of the estate's claim against the United States over and above its judgment for $40,165.48 against the McLouth estate. The right to set-off pro tanto to the extent of the government's judgment was finally adjudicated in the former appeal decided in 281 Mich. 191. Other questions discussed in the briefs are not decisive of the instant appeal nor essential to decision, and their consideration herein is not deemed necessary. The judgment entered in the circuit court is affirmed and the case remanded for certification to the probate court. Costs to appellee.

(Signed) WALTER H. NORTH.
THOMAS F. MCALLISTER.
BERT D. CHANDLER.
EDWARD M. SHARPE.
HOWARD WIEST.
HENRY M. BUTZEL.
GEORGE E. BUSHNELL.
WILLIAM W. POTTER.

[Endorsed:] Filed Sept. 5, 1939. Jay Mertz, Clerk, Supreme Court.

Note to be Printed in Margin

"The United States Shipping Board Merchant Fleet Corporation shall cease to exist and shall stand dissolved. All the records, books, papers, and corporate property of said dissolved corporation shall be taken over by the Commission. All existing contractual obligations of the dissolved corporation shall be assumed by the United States. Any suit against the dissolved corporation pending in any court of the United States shall be defended by the Commission (created by this act) upon behalf of the United States, under the supervision of the Attorney General, and any judgment obtained against the dissolved corporation in any such pending suit shall be reported to Congress in the manner provided in section 226, title 31,

United States Code, for reporting judgments against the United States in the Court of Claims." Section 203 (a) of the Merchant Marine Act, 1936 (49 Stat. 1987; U. S. C. Title 46, Sec. 1113).

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifth day of September, in the year of our Lord one thousand nine hundred and thirty-nine.

Present the Honorable HENRY M. BUTZEL, Chief Justice, HOWARD WIEST, GEORGE E. BUSHNELL, EDWARD M. SHARPE, WILLIAM W. POTTER, BERT D. CHANDLER, WALTER H. NORTH, THOMAS F. McALLISTER, Associate Justices.

40443

IN THE MATTER OF THE ESTATE OF SYDNEY C. McLOUTH, DECEASED

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN C. SHAW, ADMINISTRATOR, APPELLEE

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of St. Clair and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR. Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of St. Clair be and the same is hereby in all things affirmed, and that the appellee do recover of the appellant his costs, to be taxed, and that he have execution therefor, and the cause remanded for certification to the Probate Court.

Supreme Court of the State of Michigan

40443

IN THE MATTER OF THE ESTATE OF SYDNEY C. McLOUTH, DECEASED

UNITED STATES OF AMERICA, APPELLANT

vs.

JOHN C. SHAW, ADMINISTRATOR, APPELLEE

IN THE SUPREME COURT, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all the proceedings had and determined in the above entitled cause by said Supreme Court, including

the written decision and reasons therefor, signed by the Justices of said Court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and that it is a true transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing, this twenty-fourth day of November, in the year of our Lord, one thousand nine hundred and thirty-nine.

JAY MERTZ,
By HUGH H. CARPENTER,
Deputy Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1939

Supreme Court of the United States

Order allowing certiorari

Filed January 8, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Michigan is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 5 1939
CHARLES ELMORE CROPLEY
CLERK

No. 570

In the Supreme Court of the United States

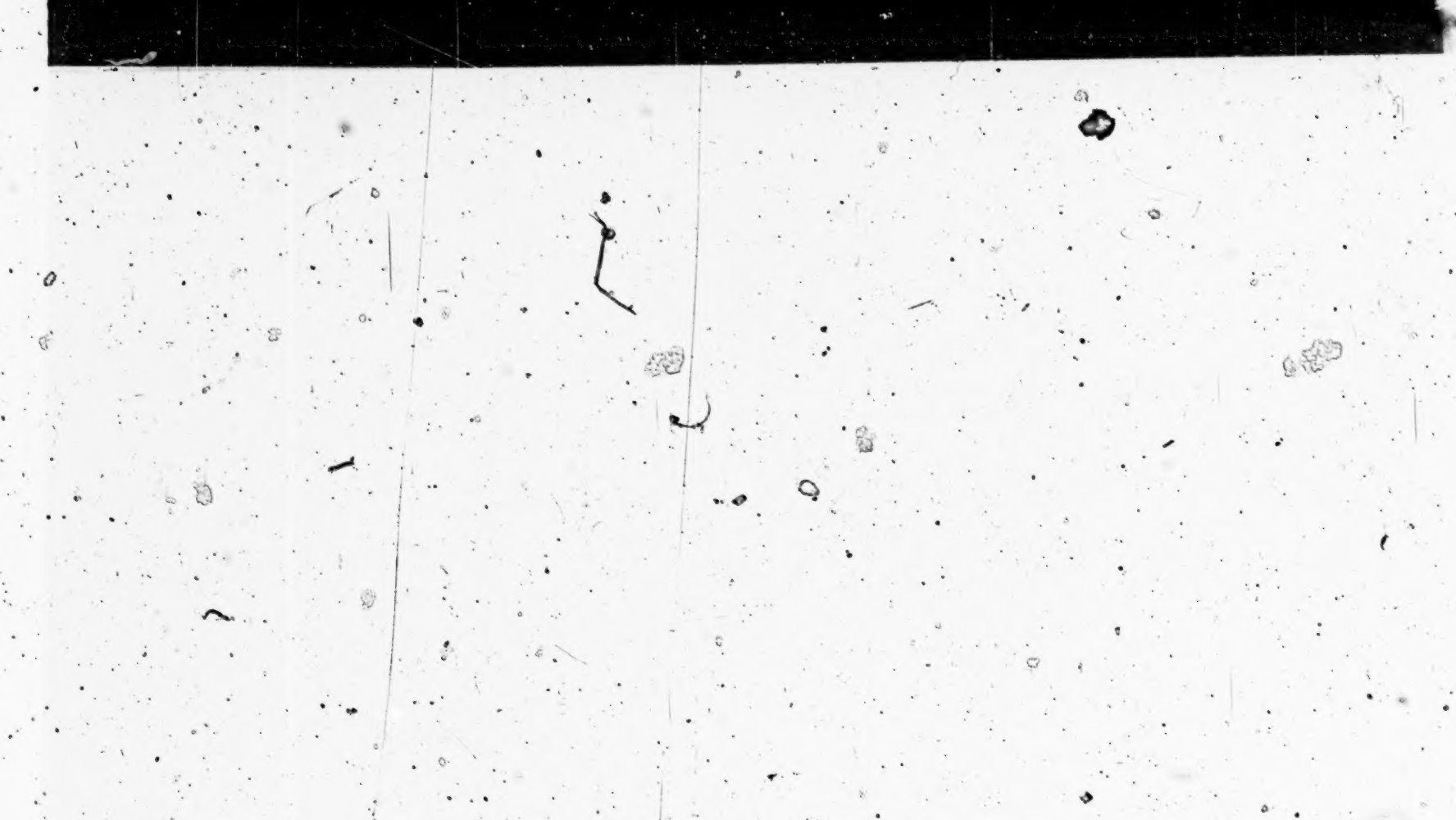
OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN C. SHAW, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF SYDNEY C. MCLOUTH, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN



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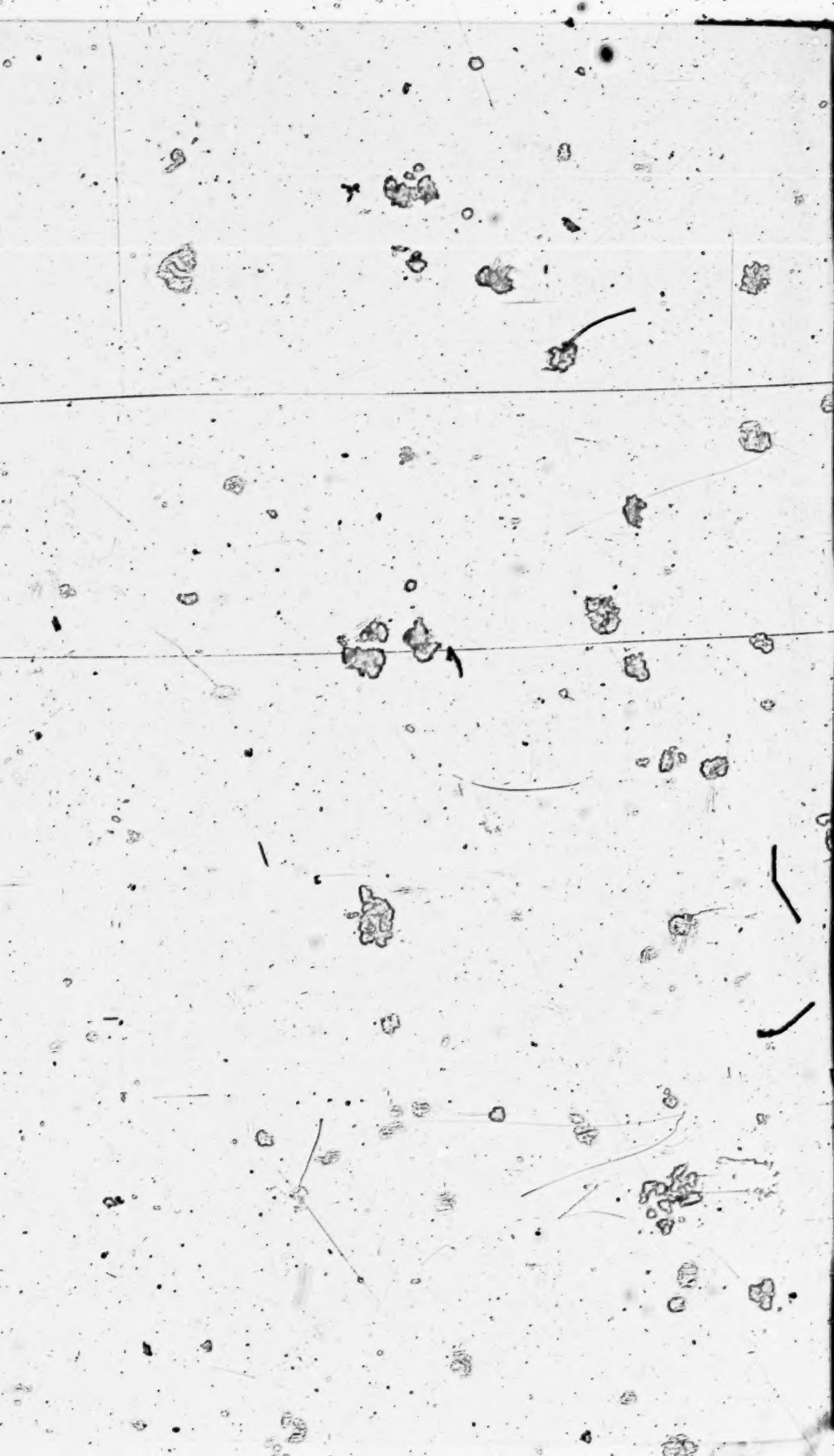

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN C. SHAW, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF SYDNEY C. McLOUTH, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Michigan entered in the above case on September 5, 1939, affirming the judgment of the Circuit Court of St. Clair County, Michigan, which in turn affirmed the order of the Probate Court of St. Clair County, Michigan.

OPINIONS BELOW

The opinion of the Probate Court (R. 13–16) is not reported. The opinion of the Circuit Court of St. Clair County (R. 42–44) is not reported. The opinion of the Supreme Court of Michigan (R. 71–79) is reported in 287 N. W. 477.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Michigan was entered on September 5, 1939 (R. 80). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decision below denied an immunity claimed by the petitioner under the Constitution, statutes, and authority of the United States.

The decision of the court below was that, by reason of a voluntary appearance in the Probate Court of Michigan for the purpose of filing a claim against a decedent's estate, the United States waived or lost its immunity from suit so that the Probate Court acquired jurisdiction to enter an affirmative money judgment against the United States. This decision involves a substantial federal question and is not in accord with the applicable decisions of this Court.

Petitioner raised the federal question orally before the Probate Court for St. Clair County (R. 13–16), on appeal from the judgment of that court against petitioner (R. 18, 42); and on appeal from the decision of the Circuit Court for St. Clair County to the Supreme Court of Michigan (R. 7, 75). Cases believed to sustain jurisdiction of this Court are *Federal Housing Administration, Region No. 4, State Director Raymond Foley* v. *Burr*, certiorari granted, No. 354, October Term, 1939; *Buchanan* v. *Alexander*, 4 How. 20.

QUESTION PRESENTED

Whether the state Probate Court acquired jurisdiction, through the United States filing a claim against

a decedent's estate, to enter an affirmative judgment against the United States on a counterclaim asserted by the estate.

STATUTE INVOLVED

Section 15682 of Chapter 266 of the Compiled Laws of Michigan (1929), which deals with Commissioners of Claims, provides that:

> When a creditor against whom the deceased had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be; but no claim barred by the statute of limitations shall be allowed by the commissioners in favor of or against the estate, as set-off or otherwise.

STATEMENT

In 1918 Sydney C. McLouth entered into a contract with the United States Shipping Board Emergency Fleet Corporation, acting for and on behalf of the United States, for the construction of nine ocean-going tugs (F. A. 107–145).[1] The contract was thereafter cancelled and McLouth and the Fleet Corporation en-

[1] As set forth more fully below, there have been two appeals to the Supreme Court of Michigan in this case. By stipulation of the parties, the record on the first appeal was made a part of the record on the second appeal (R. 2). The record on the former appeal is herein designated as "F. A."

tered into a settlement agreement adjusting the damages arising out of the cancellation (F. A. 145–149). As part of the agreement the Government assumed certain of McLouth's subcontracts and commitments; this obligation was held on an earlier appeal in this proceeding to include one made with the Ingram-Day Lumber Company (F. A. 287–290).

The Lumber Company subsequently obtained a judgment against McLouth for $42,789.96, with interest and costs, representing damages for breach of contract for the furnishing of lumber to be used in the construction of the tugs (F. A. 283–284) and, after the death of McLouth, filed its claim on the judgment in the Probate Court of St. Clair County, Michigan. This claim was allowed (F. A. 284).

In 1933 the United States obtained a judgment against McLouth in the sum of $40,165.48 (R. 30–31), representing damages for conversion of certain materials belonging to the Government, which had been supplied to McLouth for the purposes of the contract (F. A. 189–191), and shortly thereafter filed its claim on the judgment in the Probate Court (F. A. 8–31). The administrator and creditors of the estate sought to have the Ingram-Day judgment claim allowed as a set-off, extinguishing the Government's claim, upon the ground that the Government had assumed McLouth's commitment to the Lumber Company (F. A. 31–49). The Probate Court allowed the Government's claim and denied the set-off (F. A. 49–50), but its ruling as to the set-off was reversed on appeal (F. A. 278–290). See *In re McLouth's Estate*, 281 Mich. 191.

Upon remand the administrator petitioned the Probate Court to—

> grant statutory judgment * * * of the existing balance due said estate (R. 9–11).

The petition was granted and the court (R. 16)—

> ordered, adjudged and ascertained, in accordance with Section 15682 of the Compiled Laws of the State of Michigan, that United States of America is indebted to said estate in the sum of $23,628.97 as of December 8, 1937, and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate by the United States of America.

The judgment was affirmed on appeal by the Circuit Court for St. Clair County and by the Supreme Court of Michigan (R. 42–44, 80).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Michigan erred:

1. In holding that the Probate Court had jurisdiction to enter an affirmative money judgment against the United States on a counterclaim asserted by the decedent's estate.

2. In holding that by filing a claim in the Probate Court the United States consented to the entry of an affirmative money judgment for the balance found to be due the decedent's estate.

3. In failing to hold that the Probate Court was without jurisdiction to enter an affirmative money judgment on the counterclaim of the decedent's estate.

REASONS FOR GRANTING THE WRIT

1. The court below held that, because the United States filed a claim against the decedent's estate, the Probate Court acquired jurisdiction to enter an affirmative money judgment against the United States on the counterclaim asserted by the decedent's estate.

This Court, on the other hand, has frequently held that the United States by instituting suit does not consent to the entry of an affirmative judgment on a counterclaim or cross-demand. *United States* v. *Eckford*, 6 Wall. 484; *Reeside* v. *Walker*, 11 How. 271, 289–290; *Schaumburg* v. *United States*, 103 U. S. 667; *Nassau Smelting Works* v. *United States*, 266 U. S. 101, 105-106; cf. *The Siren*, 7 Wall. 152, 154. In conformity with the decisions of this Court, the lower federal courts have consistently refused to allow recovery of an affirmative judgment against the sovereign. See, e. g., *In re Patterson-MacDonald Shipbuilding Co.*, 293 Fed. 192 (C. C. A. 9), certiorari denied, *sub nom. McLean* v. *Australia*, 264 U. S. 582. *Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341 (C. C. A. 2), certiorari denied, 246 U. S. 663; *United States* v. *Nipissing Mines Co.*, 206 Fed. 431, 434 (C. C. A. 2); *Adams* v. *United States*, 3 C. Cls. 312, 333; *Peterson* v. *United States*, 26 C. Cls. 93, 98.

The court below recognized "some seeming conflict in federal decisions" but chose to follow the rule understood to be found in "the more recent federal decisions" (R. 75, 76). It relied principally on *United States* v. *The Thekla*, 266 U. S. 328, in which case a decree for damages, interest, and costs was entered against a vessel

owned by the United States on a cross-libel in a collision case. But the doctrine of the *Thekla* case has been applied only in admiralty in certain prize[2] and collision cases, requiring settlement of "unusually complicated problems" of liability in one action. See *The Gloria*, 286 Fed. 188, 203 (S. D. N. Y.). It has never been held to permit affirmative judgments in other fields, where the practical and conceptual peculiarities of the admiralty libel are absent. See *Danforth* v. *United States*, 102 F. (2d) 5, 9 (C. C. A. 8), reversed on another ground, December 4, 1939, No. 309, October Term, 1939. The opinion in *United States* v. *National City Bank*, 83 F. (2d) 236 (C. C. A. 2), certiorari denied, 299 U. S. 563, also relied upon by the court below, contains *dicta* approving a more general application, but the actual decision merely affirmed the judgment of the District Court (4 F. Supp. 417, 421) allowing a set-off in the amount of the claim of the United States.[3]

The opinion below suggests that what was done, while amounting to a final arbitration of the parties' rights, was no more than an "ascertainment" of the balance due the decedent's estate without entry of an enforcible judgment. The Probate Court, it may be noted, did more than make a finding of fact; it "ordered" and "adjudged" that the claim of the estate should be "allowed" (R. 16), and it was from that order that

[2] *The Nuestra Senora de Regla*, 108 U. S. 92; *The Paquete Habana*, 189 U. S. 453.

[3] The court also relies upon dicta in *American Propeller Co.* v. *United States*, 300 U. S. 475, 478, and *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 134. In each case the Court was reasoning from broad analogy and had no occasion to refine its statement of the rule of *The Thekla*.

the Government appealed. But even if it had undertaken simply to make a final, although unenforcible, declaration of the Government's rights, this would have been beyond its power. *United States* v. *Eckford*, 6 Wall. 484.

2. The importance of the question presented, we think, is manifest. The issue is whether the tribunals and procedures carefully established by Congress as the avenues to redress against the United States may be avoided simply because the demands arise by way of counterclaim rather than by way of original suit.

To this question the Court has long since given its answer. The Michigan court conceived that the answer has been revised. But no other court has approved the entry of an affirmative judgment against the United States in litigation outside the field of admiralty. Cf. *United States* v. *United States Fidelity and Guaranty Co.* (C. C. A. 10), decided September 6, 1939, pending on petition for writ of certiorari, filed December 5, 1939. If the rule sometimes applied in admiralty cases is to engulf the settled doctrine to which it is a seeming exception, it seems evident that this should occur only after the deliberate decision of this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

DECEMBER 1939.

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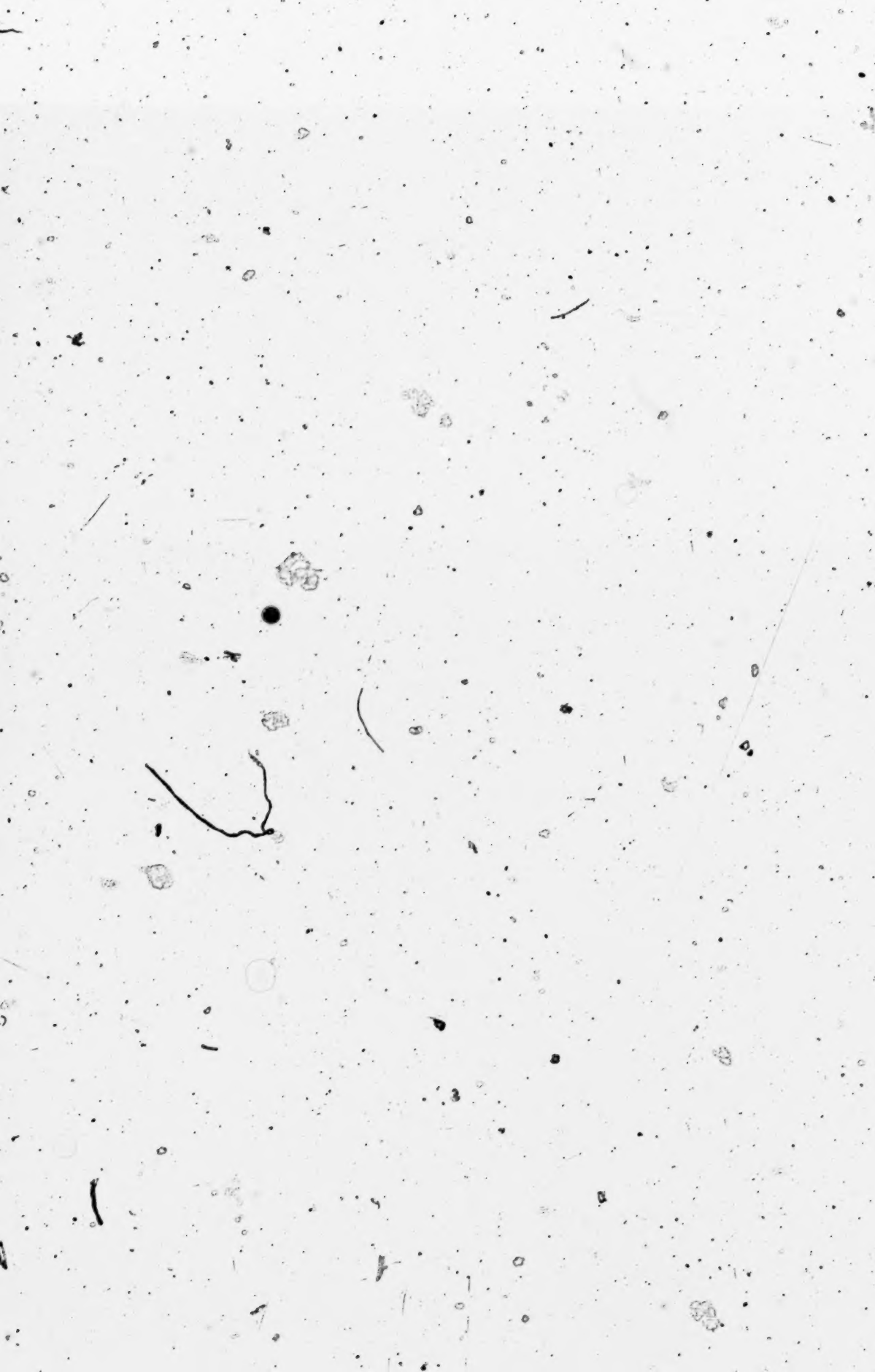

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No. 570

In the Supreme Court of the United States

OCTOBER TERM, 1939

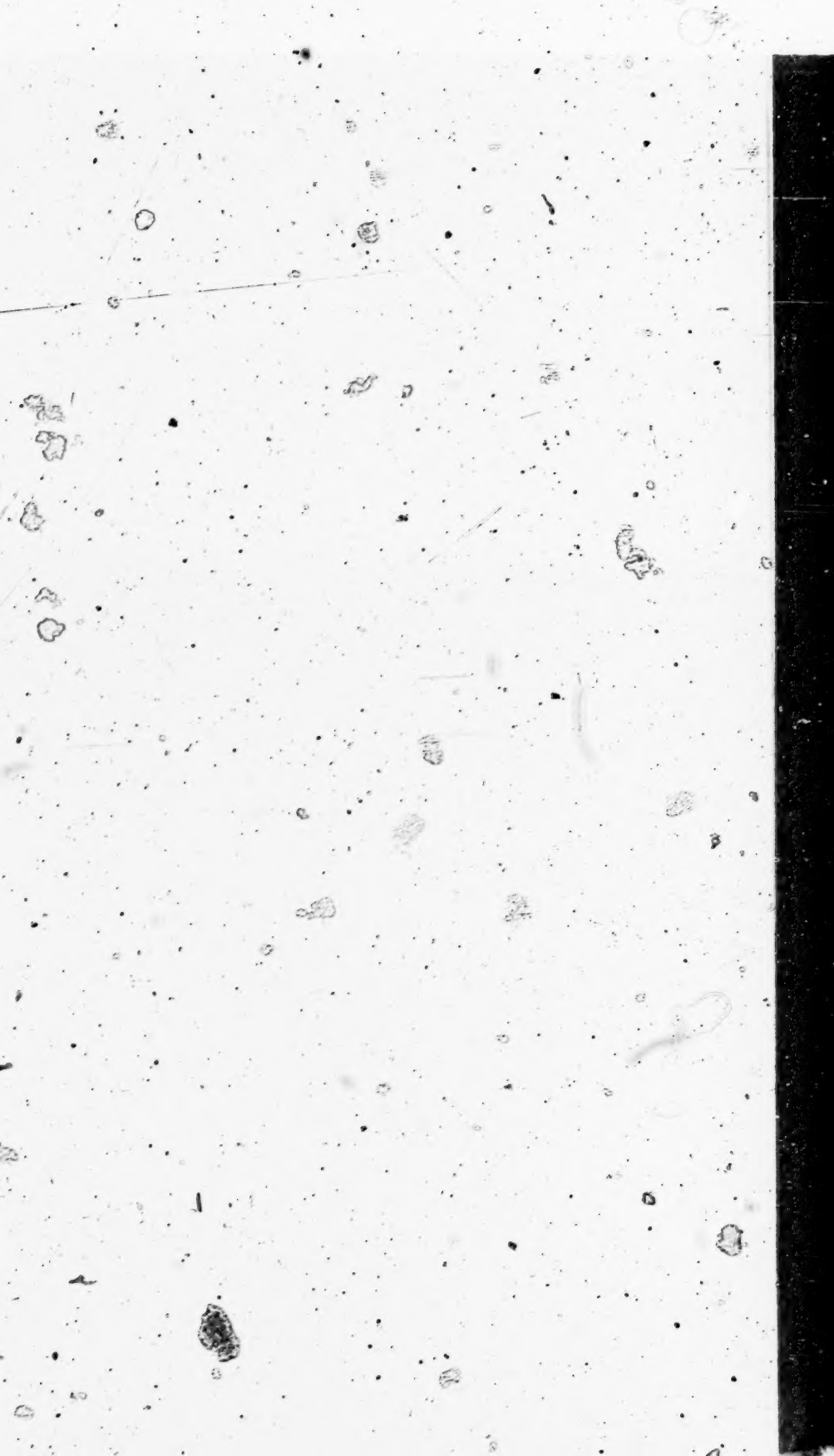
UNITED STATES OF AMERICA, PETITIONER

v.

JOHN C. SHAW, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF SYDNEY C. MCLOUTH, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER



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The statement of facts in the petition make several references to the record on the first appeal to the Supreme Court of Michigan (pp. 3–4). Those facts do not bear on the question presented by the petition but are explanatory of the preceding litigation. It now appears that the record on the first appeal is not a part of the record certified to this Court, and that the stipulation is not so broad as we first read it (R. 2; Pet. 3). However, all of the facts as to which reference is made in the petition to the record on the first appeal are found in the opinion of the Supreme Court of Michigan (R. 71–72) and the opinions there cited. *Ingram-Day Lumber Co.* v. *McLouth*, 275 U. S. 471; *In re McLouth's*

Estate, 281 Mich. 191; *Shaw* v. *United States*, 75 F. (2d) 175 (C. C. A. 6th). We therefore think it unnecessary to petition that the record on the first appeal in this case be brought before this Court. This memorandum is filed simply to remove any confusion that might arise because of the references in the petition to the record on the first appeal.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

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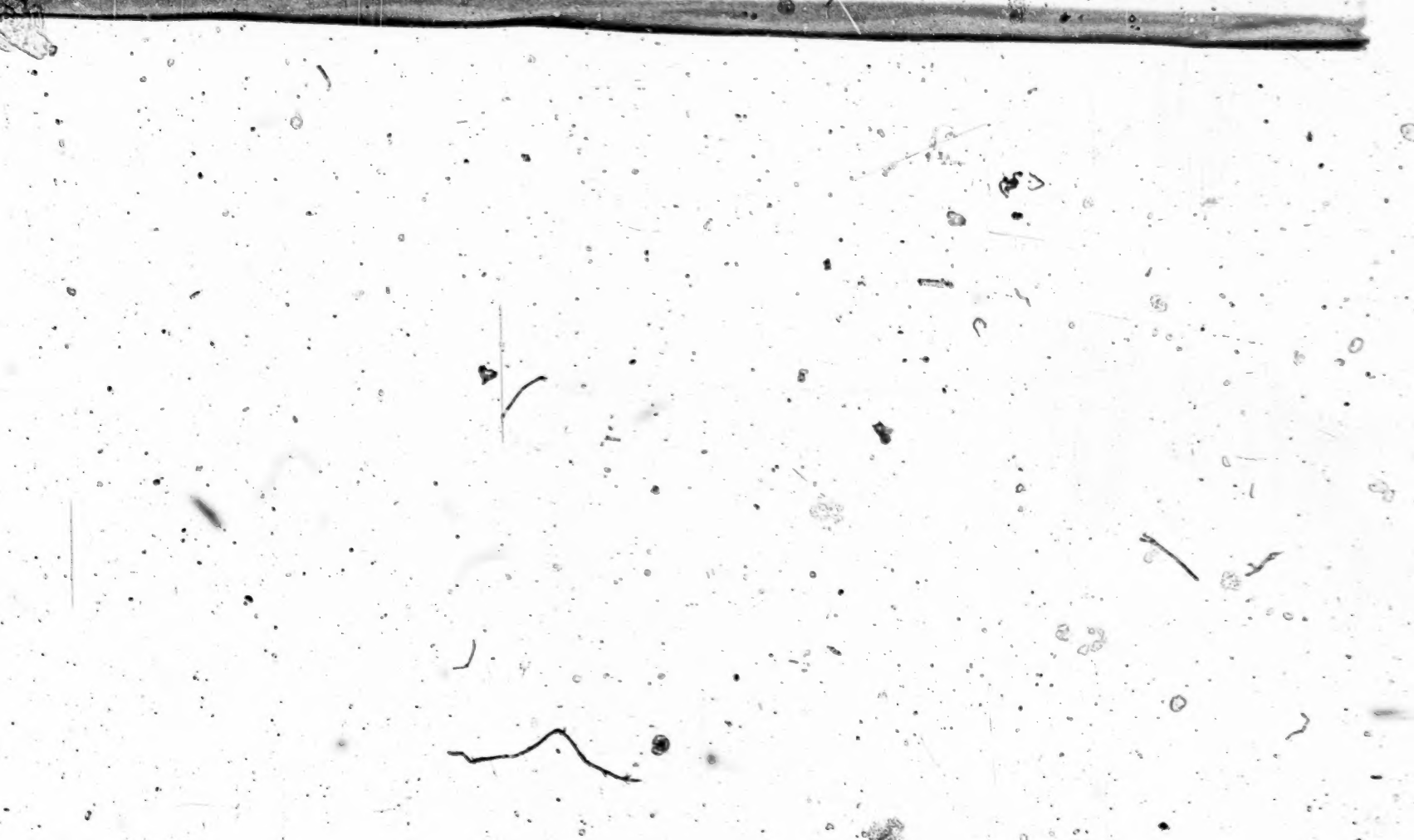

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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 570

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN C. SHAW, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF SYDNEY C. MCLOUTH, DECEASED

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Probate Court (R. 13–16) and the Circuit Court of St. Clair County (R. 42–44) are not reported. The opinion of the Supreme Court of Michigan (R. 71–79) is reported in 290 Mich. 311.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered September 5, 1939 (R. 80). The petition for a writ of certiorari was filed

December 5, 1939, and was granted January 8, 1940. The jurisdiction of this Court rests upon Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States by filing a claim against an estate in a state probate court subjected itself to the entry of an affirmative judgment against it on a counterclaim asserted by the estate.

STATUTES INVOLVED

The statutes pertinent to this case are Section 951 of the Revised Statutes (Act of March 3, 1797, c. 20, 1 Stat. 512, 28 U. S. C. sec. 774), dealing with credits against the United States in suits brought by it; the Tucker Act (Sections 24 and 145 of the Judicial Code, 28 U. S. C. secs. 41, 250) conferring on the United States district courts and the Court of Claims jurisdiction of claims against the United States in certain circumstances; Section 15682 of Chapter 266 of the Compiled Laws of Michigan (1929), providing for the presentation of offsets against persons filing claims against decedents' estates, and the striking of balances thereon; and Chapter 1, Sec. 20, of the Probate Code of Michigan of June 20, 1939 (Michigan Stat. Ann. August 1939 Supp., Sec. 27.3178(20)), dealing with the powers of probate judges. The relevant portions of these statutes are set out in the Appendix, *infra*, pp. 33–38.

STATEMENT

In 1918 Sydney C. McLouth entered into a contract with the United States Shipping Board Emergency Fleet Corporation, acting for and on behalf of the United States, for the construction of nine ocean-going tugs (281 Mich. 193).[1] The contract was thereafter cancelled and McLouth and the Fleet Corporation entered into a settlement agreement adjusting the damages arising out of the cancellation (281 Mich. 194). As part of the agreement the Government assumed certain of McLouth's subcontracts and commitments; this assumption was held on an earlier appeal in this proceeding to include a commitment made with the Ingram-Day Lumber Company (281 Mich. 195).

The Lumber Company subsequently obtained a judgment against McLouth for $42,789.96, with interest and costs, representing damages for breach of a contract for the furnishing of lumber to be used in the construction of the tugs (281 Mich. 196), and, after the death of McLouth, filed its claim on the judgment in the Probate Court of St. Clair County, Michigan. With accrued interest and costs to 1932 the claim was allowed in the sum of $58,089.04 (R. 71).

[1] There have been two appeals to the Supreme Court of Michigan in this case. Certain facts which we deem informative, though not necessary to the decision of this case, do not appear in the record in this case but are set forth in the opinion of the Supreme Court of Michigan on the first appeal. *In re McLouth's Estate*, 281 Mich. 191.

In 1933 the United States obtained a judgment against McLouth in a federal district court in the sum of $40,165.48 (R. 15, 72; *Shaw* v. *United States*, 75 F. (2d) 175, (C. C. A. 6th), representing damages for the conversion of certain materials belonging to the Government, which had been supplied to McLouth for the purposes of the contract (281 Mich. 196–198). Shortly thereafter the Government filed its claim on the judgment in the probate court (281 Mich. 197). The administrator and creditors of the estate sought to have the Ingram-Day judgment claim allowed as a set-off, extinguishing the Government's claim, upon the ground that the Government had assumed McLouth's commitment to the Lumber Company (281 Mich. 197). The Probate Court allowed the Government's claim and denied the set-off (281 Mich. 197), but its ruling as to the set-off was reversed on appeal. See *In re McLouth's Estate*, 281 Mich. 191.

Upon remand the administrator petitioned the Probate Court to "grant statutory judgment * * * of the existing balance due said estate (R. 11). The petition was granted and the court, finding that the Government's claim, with interest to December 8, 1937, amounted to $49,442.41 and the respondent's counterclaim to $73,071.38 (R. 14-15), "ordered, adjudged and ascertained, in accordance with Section 15682 of the Compiled Laws of the State of Michigan,[2] that United States of

[2] Section 15682 of the Compiled Laws of Michigan (1929) is set out *infra*, p. 37.

America is indebted to said estate in the sum of $23,628.97 as of December 8, 1937, and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate by the United States of America" (R. 16). The judgment was affirmed on appeal by the Circuit Court for St. Clair County and by the Supreme Court of Michigan (R. 42–44, 80).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Michigan erred:

1. In holding that the Probate Court had power to enter an affirmative judgment against the United States on a counterclaim asserted by the decedent's estate.

2. In holding that by filing a claim in the Probate Court the United States consented to the entry of an affirmative judgment for the balance found to be due the decedent's estate.

3. In failing to hold that the Probate Court was without power to enter an affirmative money judgment on the counterclaim of the decedent's estate.

SUMMARY OF ARGUMENT

I

The United States did not, by filing a claim in the Probate Court, subject itself to the entry of an affirmative judgment.

A. Federal statutes and the decisions of this Court establish that the affirmative judgment was improper. Congress, by the Act of March 3, 1797,

c. 20, 1 Stat. 512, 514, and its successor legislation (R. S., Sec. 951, 28 U. S. C. sec. 774, set out *infra*, p. 35), provided for the allowance of credits against the United States for the purpose of extinguishing its claims in suits brought by it, but that statute does not allow affirmative judgments against the United States on counterclaims. *United States* v. *Eckford*, 6 Wall. 484. The Tucker Act (set out *infra*, pp. 33–37) provides for direct suit against the United States in the federal courts in certain circumstances, but it confers no consent to suit in state courts and probably cannot be used even as a basis of a counterclaim in the federal courts. *United States* v. *Nipissing Mines Co.*, 206 Fed. 431, certiorari dismissed, 234 U. S. 765.

The decision below is thus erroneous, unless the United States, by bringing suit, subjects itself to an affirmative judgment on a counterclaim in a forum in which Congress has not consented that it be sued. This Court has long held that the United States does not, by suing, consent to the entry of an affirmative judgment against it. *Reeside* v. *Walker*, 11 How. 271; *United States* v. *Eckford*, 6 Wall. 484. *The Thekla*, 266 U. S. 328, relied on below, turns on concepts peculiar to admiralty law and has no application here.

The doctrine of the *Eckford* and *Reeside* cases is sound in principle and should not be overturned. The Government's immunity from unconsented suit should extend to counterclaims even though the want of consent were derived from the silence of

Congress alone. But Congress has not remained silent. It has prescribed the forums and conditions for the presentation of claims against the Government, whether in original suits or as defensive matter. By necessary implication, Congress has made a deliberate determination that no demand outside the scope of the permissive statutes may be entertained in any forum. Cf. *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21.

B. Whether the United States, by filing a suit in a state court, subjects itself to the entry of an affirmative judgment is a federal question. The immunity of the United States from suit without its consent is derived from the Constitution. *United States* v. *Thompson*, 98 U. S. 486, 490. Its extent in any given case is a federal question, determinable according to the intention of Congress, express or implied. *Federal Land Bank* v. *Priddy*, 295 U. S. 229; *Minnesota* v. *United States*, 305 U. S. 382. And, as has been shown, the intention of Congress is clear that the United States does not by filing suit in a state court subject itself to affirmative judgment by counterclaim.

It is not suggested in the opinion below that Michigan could require the United States to surrender any portion of its immunity as a condition of access to the state courts. Such a suggestion would, of course, run counter to the principle that a State may not as the price of a privilege exact assent to a condition modifying the distribution of power between it and the federal Government. Cf. *Terral* v. *Burke Construction Co.*, 257 U. S. 529.

ARGUMENT

I

THE UNITED STATES DID NOT BY FILING A CLAIM IN THE PROBATE COURT SUBJECT ITSELF TO THE ENTRY OF AN AFFIRMATIVE JUDGMENT

A. THE IMMUNITY OF THE UNITED STATES FROM UNCONSENTED SUIT EXTENDS TO DEMANDS FOR AFFIRMATIVE JUDGMENT ON A COUNTERCLAIM

1. *The statutes.*—The right to counterclaim for an amount in excess of the original claim of the Government cannot be derived from any act of Congress, and is plainly, though impliedly, negatived by the relevant statutes.

By the Act of March 3, 1797, c. 20, 1 Stat. 512, 514, and its successor legislation (R. S. sec. 951, 28 U. S. C., sec. 774), Congress has provided that in "suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the General Accounting Office [formerly the accounting officers of the Treasury] for its examination, and to have been by it disallowed," except that in certain enumerated circumstances presentation and disallowance is excused. By implication, it has long been held, the statute permits a credit or set-off where the conditions have been complied with (*United States* v. *Wilkins*, 6 Wheat. 135), but only to the extent necessary to extinguish the Government's claim. *United States* v. *Eckford*, 6 Wall. 484, 489.

The Tucker Act (March 3, 1887, c. 359, 24 Stat. 505, 28 U. S. C. sec. 41 (20)) confers no consent to suit or counterclaim in the state courts. It certainly confers no consent to counterclaims in the federal district courts for balances which are in excess of $10,000. Indeed, even as to lesser amounts the Tucker Act "prescribes procedure inconsistent with its use as the basis of a counterclaim" in any court. *United States* v. *Nipissing Mines Company*, 206 Fed. 431, 434 (C. C. A. 2d), certiorari dismissed, 234 U. S. 765.

Congress has not merely withheld its consent to affirmative judgment by counterclaim in the state courts. By providing forums and conditions agreeable to the United States, it has by clear implication determined that demands against the Government, whether by original suit or by counterclaim, may not be entertained elsewhere or on other terms. The question presented is thus whether, notwithstanding what is evidently a deliberate determination by Congress to the contrary, the United States subjects itself to an affirmative judgment on a counterclaim by bringing suit.

2. *The decisions.*—This Court has long since given its answer to the question whether, when Congress has not consented to counterclaim, the United States by bringing suit subjects itself to affirmative judgment by counterclaim.

In *Reeside* v *Walker*, 11 How. 271, the Court said (p. 290):

> To permit a demand in set-off against the government to be proceeded on to judgment

against it, would be equivalent to the permission of a suit to be prosecuted against it. And however this may be tolerated between individuals, by a species of reconvention, when demands in set-off are sought to be recovered, it could not be as against the government except by a mere evasion, and must be as useless in the end as it would be derogatory to judicial fairness.

In *United States* v. *Eckford*, 6 Wall. 484, the Court held that institution of suit by the United States does not constitute submission to the entry of an affirmative judgment fixing the liability of the United States. In that case the United States brought suit against the executors of Eckford on his official bond in the District Court for the Southern District of New York. He pleaded a set-off under the Act of March 3, 1797. The jury sustained the plea and certified that there was due from the United States to the defendant the sum of $20,545.00. The Court of Claims decided that the finding of the jury constituted in substance and effect a valid and binding judgment against the United States, and was conclusive and not subject to reexamination in an independent proceeding. On appeal this Court held that the Act of March 3, 1797, provided for "claim for a credit" only and not "a demand for judgment" (6 Wall. at 489). The Court discussed with approval the doctrine of *Recside* v. *Walker*, *supra*, that a demand for judgment on a set-off is the same thing as the prosecution of an independent suit which cannot be done without

the consent of the United States. The Court concluded by saying (6 Wall. at 491):

> Without extending the argument, we adopt the views expressed by this court in the case of *De Groot* v. *United States* [5 Wall. 419], decided at the last term, that when the United States is plaintiff and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount.[2]

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[2] Accord: *De Groot* v. *United States*, 5 Wall. 419, 431; *Schaumburg* v. *United States*, 103 U. S. 667; *Illinois Cent. R. R. Co.* v. *Pub. Utilities Comm.*, 245 U. S. 493, 504, 505; *Nassau Smelting Works* v. *United States*, 266 U. S. 101, 105–106; *United States* v. *Nipissing Mines Co.*, 206 Fed. 431, 434 (C. C. A. 2d), certiorari dismissed, 234 U. S. 765; *United States* v. *Gillies*, 144 Fed. 991 (C. C. E. D. N. Y.); *Adams* v. *United States*, 3 C. Cls. 312, 333; *Gerding* v. *United States*, 26 C. Cls. 319; *United States* v. *Various Articles of Property*, 11 F. Supp. 992 (W. D. N. Y.); *Port Royal & A. Ry. Co.* v. *South Carolina*, 60 Fed. 552 (C. C. D. S. C.). *Cf. In re Patterson-MacDonald Shipbuilding Co.*, 293 Fed. 192 (C. C. A. 9th), certiorari denied, *sub nom. McLean* v. *Australia*, 264 U. S. 582; *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341, 344 (C. C. A. 2d), certiorari denied, 246 U. S. 663; *French Republic* v. *Inland Navigation Co.*, 263 Fed. 410, 413 (E. D. Mo.). The state courts have uniformly held that a counterclaim cannot be made the basis of an affirmative judgment against a sovereign state. *White* v. *The Governor*, 18 Ala. 767; *Holmes* v. *The State*, 100 Ala. 291; *State* v. *Arkansas Brick Mfg. Co.*, 98 Ark. 125; *People* v. *Miles*, 56 Cal. 401; *State* v. *Royal Consolidated Min. Co.*, 187 Cal. 343, 347; *Rowan* v. *Sharps' Rifle*

There is no occasion in this case to overturn the doctrine of the *Eckford* case. A counterclaim constitutes no part of the subject matter of the original claim. The right of counterclaim is purely a creature of statute. The common law recognized neither set-off or counterclaim, but only the defense of recoupment. See *The Gloria*, 286 Fed. 188, 192. The right of set-off was first introduced by the statute of 8 Geo. II, c. 22, sec. 13.[2] The procedural device of counterclaim is an even more modern innovation. That it is the equivalent of an original claim has been the doctrine of this Court for almost a century. And, as has been shown, Congress has not remained silent on this subject. It has by legislation expressly chosen a restricted

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Mfg. Co., 29 Conn. 282; *Commonwealth* v. *Owensboro & Nashville R. R. Co.*, 81 Ky. 572; *State* v. *Leckie*, 14 La. Ann. 636, 638; *State* v. *Liberty Oil Co.*, 154 La. 267; *State* v. *Balt. & Ohio R. R. Co.*, 34 Md. 344, 374; *State* v. *Holgate*, 107 Minn. 71, 73; *Auditor General* v. *Treasurer*, 73 Mich. 28; *Auditor General* v. *Bay County*, 106 Mich. 662; *Battle* v. *Thompson*, 65 N. C. 406; *Raymond* v. *State*, 54 Miss. 562, 563; *United States* v. *Warren*, 12 Okla. 350; *Commonwealth* v. *Matlack*, 4 Dall. (Pa.) 303; *Commonwealth* v. *Philadelphia County*, 157 Pa. 531, 545; *State* v. *Corbin & Stone*, 16 S. C. 533, 543; *Moore* v. *Tate*, 87 Tenn. 725; *Bates* v. *The Republic*, 2 Texas 616; *Chevaier's Administrator* v. *The State*, 10 Texas 315. *Cf. Republic of France* v. *Pittsburg S. E. Co.*, 112 Misc. (N. Y.) 688.

[2] This statute was held not to bind the Crown. Chitty, *Prerogatives of The Crown* (1820), 366, 383; 1 Halsbury's *Laws of England* (Hailsham ed.) 25; *The Attorney-General* v. *Guy Motors, Ltd.* [1928], 2 K. B. 78; *Queen* v. *Whitehead* (1884), 1 Exch. C. R. 134, 142–3. Cf. *Raymond* v. *State*, 54 Miss. 562.

forum and prescribed conditions agreeable to the Government. Admittedly the respondent's counterclaim is not a suit or claim for credit within the meaning of that legislation. By necessary implication Congress has declared that the United States cannot be subjected to the judgment entered on the respondent's counterclaim.

The court below deemed statutory consent unnecessary for the reason that the United States had impliedly waived its immunity by submitting its claim for the adjudication of the probate court. The court recognized "some seeming conflict in federal decisions" but purported to follow "the more recent federal decisions" (R. 75-76), which it conceived to formulate a rule of sovereign liability.

Principal reliance was placed upon *The Thekla*, 266 U. S. 328. In that case, the Luckenbach Company filed a libel *in rem* against *The Thekla* for a collision with the *F. J. Luckenbach*. The owners of *The Thekla* gave a stipulation for value, answered the libel, and filed a cross libel against the *F. J. Luckenbach*. Shortly thereafter the claimants of *The Thekla* filed a motion to stay proceedings under the original libel until security should be given to respond to the cross libel, which motion was granted. The United States, which operated the *F. J. Luckenbach* under charter, thereafter claimed ownership and possession and on its own motion was made the party libellant. Thereupon the United States Shipping Board Emergency

Fleet Corporation in order to lift the stay, filed a stipulation to respond in damages to the cross libel. A decree for damages, interest, and costs against the United States was approved by the Court.[4]

The decision, as the opinion of Mr. Justice Holmes makes clear, was rested on the peculiar admiralty conception that "the subject matter" of the action "is the collision, rather than the vessel first libelled" (266 U. S. at 340). The Court expressly disclaimed any intention to "qualify * * * in any way" the decisions cited by the Government holding that a claim that would not constitute a cause of action against the sovereign cannot be asserted as a counterclaim (*id.*, p. 339). Indeed, in *Nassau Smelting Works* v. *United States*, 266 U. S. 101, referred to in the opinion in *The Thekla* and decided but two weeks before, this Court observed (p. 106):

> The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it.

The prize cases are even more remote. In *The Nuestra Senora de Regla*, 108 U. S. 92, the United States during the Civil War seized a Spanish vessel not subject to capture and, after a long delay,

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[4] The question does not appear to have been presented to or considered by the court whether the Act of March 3, 1797 (*supra*, p. 8), was applicable to the cross libel.

filed a libel of information in prize in a district court. The owner filed a claim. A decree was entered directing that the vessel be restored to the owner but reserving all questions of damages and costs pending consideration and adjustment by the Governments of the United States and Spain. After several years of negotiations the State Department agreed to submit the questions to the court to obtain such further "relief as justice demanded, and in the mode that tribunal should deem most proper and convenient." This Court held that a decree should be entered against the United States for the value of the vessel, and damages for the delay in proceeding to adjudication, together with interest from the date of the decree.

The Court was of the view that the executive had voluntarily submitted the cause for the express purpose of having a judicial determination according to the rules applicable to private persons in like cases. To the objection that the executive branch of the Government was without authority to make such submission, the Court observed that "It was the duty of the United States, under the law of nations, to bring all captured vessels into a prize court for adjudication." (108 U. S. at 102.) The decision thus appears to rest on a special doctrine of international law in prize cases and the authority of the executive in such cases to consent to suit. The facts in *The Paquete Habana*, 189 U. S. 453 were substantially the same, except that there had

been no diplomatic negotiations with a foreign government.[5] See Note, 36 Harv. L. Rev. 871, 873.

There is a suggestion in the opinion below that the order of the Probate Court, although a "final determination of the rights of the litigants" (R. 78), constituted no more than a mere "ascertainment" approved by this Court in the *Eckford* case. By "ascertainment" this Court obviously meant a mere statement of opinion in passing, not purporting to be a binding adjudication. But under the Michigan law, the order of the Probate Court is not subject to collateral attack (*Calhoun* v. *Cracknell*; 202 Mich. 430; *Burgess* v. *Stribling*, 134 Mich. 33, 37; *Heap* v. *Heap*, 258 Mich. 250, 259; *McDannel* v. *Black*, 270 Mich. 305, 310). And since the question of the Probate Court's jurisdiction to enter the order has been raised and litigated in this case, the order would presumably have to be given the effect of *res judicata* in an independent proceeding, which is precisely what this Court held could not be done in the *Eckford* case. It is, therefore, immaterial what methods are ordinarily available for the enforcement of the orders of the Probate Court. It may be noted, however, that such orders may be enforced against private persons by process of the Probate Court, either by contempt proceedings or,

[5] The court below also relied upon dicta in *American Propeller Co.* v. *United States*, 300 U. S. 475, 478, and *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 134. In each case the Court was reasoning from broad analogy and had no occasion to refine its statement of the rule of *The Thekla*.

at least since September 29, 1939, by execution. Michigan Compiled Laws of 1939, Sec. 15520; Michigan Statutes Ann. August 1929, Supp. Sec. 27.3178 (20); *In re Merrill,* 200 Mich. 244. Moreover, the Supreme Court of Michigan in affirming the order of the Probate Court, directed that the respondent recover costs from the United States and that he "have execution therefor" (R. 20).

The distinction between a judgment and a so-called "ascertainment" is determinative whether Congress will reexamine the merits of the claim which is the subject of a judicial pronouncement. The Act of March 3, 1863, c. 92, 12 Stat. 765, which was the first grant of authority to the Court of Claims to render final judgments, contained a provision (Sec. 14) "that no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury." Because of this provision, this Court held that it was without power to review determinations of the Court of Claims. *Gordon* v. *United States,* 2 Wall. 561, 117 U. S. 698 (opinion of Chief Justice Taney). Section 14 was thereafter repealed (c. 19, 14 Stat. 9) and there has never been any doubt since that the judgments of the Court of Claims, if no review is obtained, or of this Court on review, are "absolutely final and conclusive of the rights of the parties", *Williams* v. *United States,* 289 U. S. 553, 564. All judgments against the United States are now paid by appropriations pursuant to estimates

prepared by the Bureau of the Budget for the congressional committees on appropriations under the Act of April 27, 1904, c. 1630, 33 Stat. 394, 422; 31 U. S. C. sec. 583 (2). See also 31 U. S. C. secs. 225–6. The paucity of cases in which the Congress has sought to re-examine the merits of claims finally adjudicated in the Court of Claims (see e. g., *Pocono Pines Assembly Hotels Co.* v. *United States*, 73 C. Cls. 447; *Ex parte Pocono Assembly Hotels Co.*, 285 U. S. 526 (motion for leave to file petition for writ of mandamus and/or prohibition denied)) attests the unity of theory and practice.

So far as can be determined, on the other hand, Congress has considered that a mere "ascertainment," as distinguished from a judgment, does not obligate the Government to pay a claim without re-examination of its merits. Such was the view of the House Judiciary Committee in 1844 with respect to a claim founded upon the certificate of the jury in the *Reeside* case. The committee rejected the contention that the jury's certificate evidenced a "debt of record", observed that no court had power to enter an affirmative judgment against the United States, and recommended that the claim should not be repaid without consideration of its merits. House Report No. 163, 28th Cong., 1st Sess. (1843–1844).[6]

[6] The relevant portions of this report are set forth in the Appendix, *infra*, pp. 33–39.

3. *The considerations of policy.*—The "historic" or "metaphysical" foundations of the doctrine of sovereign immunity from suit are of only "academic" interest at this date. Cf. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 388. The survival of the rule in modern times springs from the recognition that "there may be sound reasons of public policy why a state should be immune from the harassment of litigation in forums and under conditions not agreeable to the state." See *The Gloria*, 286 Fed. 188, 194. Cf. *Minnesota v. United States*, 305 U. S. 382, 388. Moreover, immunity from suit today affords an appropriate and convenient basis for designating the types of claims which the United States is willing to have litigated against it, as is done in the Tucker Act.

When the United States sues, the historic common law defense of recoupment, which is limited to cross-demands arising out of the same transaction from which the main suit stems, may be asserted without increasing the burden of the Government, and should be allowed in order to prevent recovery where in fact no debt is owing. Cf. *Bull v. United States*, 295 U. S. 247, 261. Whether, in the absence of statutory authority, the defendant should be permitted to set off claims arising out of matters not related to the main action, is a far

more doubtful question, but is not presented here. It is the Government's position that in any event the substantial considerations of policy which underlie the immunity of the United States from original suit apply with equal force to any affirmative judgment entered on a defendant's counterclaim.

Congress designated in the Tucker Act the forums in which it was willing that the United States be sued, and the types of claims which it was willing to have litigated against the Government. That the Congress intended to consent to original suits alone and to withhold consent to counterclaims appears from the fact that the statute "prescribes procedure inconsistent with its use as the basis of a counter claim." *United States* v. *Nipissing Mines Co.*, 206 Fed. 431, 434 (C. C. A. 2d), certiorari dismissed, 234 U. S. 765. The divergencies which Congress prescribed for procedure under the Tucker Act or in the Court of Claims from that followed elsewhere indicate, moreover, its judgment that ordinary procedure would not adequately protect the Government. Congress expressly provided that all cases under the Tucker Act should be tried without a jury. Act of March 3, 1887, Sec. 2, c. 359, 24 Stat. 505; 28 U. S. C. sec. 41 (20). It prescribed a six-year period of limitations for all suits against the United States under the Tucker Act. *Ibid.*; 28 U. S. C. sec. 262. The United States enjoys a further important advantage under the provision of the Tucker Act authorizing the Court

of Claims to grant the Government a new trial at any time within two years after judgment upon production of evidence of "fraud, wrong, or injustice". 28 U. S. C. sec. 282.[8a]

The Tucker Act confers jurisdiction on the Court of Claims of claims against the United States of enumerated types, and concurrent jurisdiction on the federal district courts of such claims not exceeding $10,000. Congress gave no consent whatever to suit in the state courts. The omission from the Tucker Act of consent to be sued in state courts is sufficient evidence of an intention that the Government should not be subject to suit there. The reason for the omission is not expressly revealed in the legislative history but it may have been doubtful whether the United States could obtain equal justice in state courts, where judges or juries might well have felt that the vast resources of the federal Government, gathered largely from other regions, pointed toward generosity to plaintiffs. Cf. *United States* v. *Thompson*, 98 U. S. 486, 491. It may be observed in this connection that Congress limited the jurisdiction of the federal district courts under the Tucker

[8a] With respect to this provision it has been observed: "Special safeguards against fraudulent claims are certainly justifiable. The Government is more exposed to fraud than an individual; and the public interest which is the interest of nobody in particular, may justly claim the special protection of the law to counterbalance the natural watchfulness with which private interests are guarded." (Freund, *Private Claims Against the State*, 8 Pol. Sci. Q. 625, 631.)

Act to claims not exceeding $10,000, and this limitation would seem to forbid the entry of an affirmative judgment in excess of that amount, even on the assumption, which we believe to be erroneous, that the district courts have power under the Tucker Act to entertain counterclaims. Cf. *Nassau Smelting Works* v. *United States*, 266 U. S. 101; see *North Dakota-Montana Wheat Growers' Association* v. *United States*, 66 F. (2d) 573 (C. C. A. 8th), certiorari denied, 291 U. S. 672. But if the decision of the court below is upheld the state courts, by strange paradox, will enjoy a more extensive authority to entertain counterclaims against the United States than that possessed by the federal courts. For if a state court may entertain a counterclaim at all, there is no legal basis for limiting the amount of the affirmative judgment which it may enter.

To sustain the decision below would not merely lead to an incongruous result. It would defeat the policy and purpose of Congress expressly embodied in the Tucker Act that large claims against the United States should be litigated at the seat of the Government. As to all claims in excess of $10,000 Congress apparently deemed it desirable to establish a special tribunal "trained in the consideration of intricate problems involved in such determinations". See *United States* v. *Skinner & Eddy Corp.*, 35 F. (2d) 889, 901 (C. C. A. 9th). Even more important was the purpose to prevent the great inconvenience and public detriment which

would result if Government officers were required to defend or aid in the defense of suits at points remote from the capital. Cf. *Davis* v. *West Virginia Bridge Commission*, 113 W. Va. 110; *Greene* v. *Wolf*, 175 Ky. 58, 61–62. That the jurisdiction of the district courts was limited for the purpose of protecting the United States, notwithstanding the acknowledged inconvenience to private claimants, appears from the following statements in the debates on the Tucker Act in the House (18 Cong. Rec. 624):

> Mr. BRECKINRIDGE, of Kentucky. Why is it that in the first section of the bill the jurisdiction of the circuit and district courts of the United States is limited to such sums as do not exceed $10,000? Why is it that jurisdiction should not be made so all claims should be filed in the circuit and district courts?
>
> Mr. TUCKER. Upon full consideration by the committee, it was thought where a claim exceeded $10,000 it would be better and safer for the Government it should be where the head of the Department may be present to protect the Government.
>
> Mr. BRECKINRIDGE, of Kentucky. That throws on the Court of Claims the entire business—a glut of cases—including the $15,000,000 of Indian claims—all claims exceeding $10,000. In the second place, if the gentleman allows me, I will make the suggestion it takes a claimant far away from his

home, and before a court which must be very much crowded with business.

Mr. TUCKER. My friend from Kentucky will remember this bill is in relief of claimants. If the claims are under $10,000 he has to come there to-day.

Mr. BRECKINRIDGE, of Kentucky. I think as far as it has gone it is in the right direction. I wish to see if we cannot get it to go further than it does.

Mr. TUCKER. We tried to make a fair compromise.

Most of the states which have consented to suit have likewise prescribed a forum at the seat of the Government. The states of Alabama, Illinois, Michigan, New York, and Utah have established a court or board of claims holding its sessions at the capital. Others, including California, Indiana, Massachusetts, Mississippi, Nebraska, Virginia, Washington, West Virginia, and Wisconsin, have consented to be sued in a court of ordinary jurisdiction but have either expressly limited jurisdiction to the court of the county in which the seat of the Government is located, or authorized a change

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[7] Cumulative Supplement to the Code of Alabama, 1936, Sec. 2992(26) *et seq.*; Jones, *Illinois Statutes Annotated*, Vol. 27, Sec. 126.057 *et seq.*; Mich Stats. Ann., Sec. 3.451; New York's Code of Civil Procedure, Secs. 263 *et seq.*; Revised Statutes of Utah, 1933, Title 26, Sec. 26–0–1.

of venue to that county on motion of the Attorney General.[8] The reason for the limitation of the forum in the state statutes is to avoid the interference with the conduct of public affairs which might result if Government officers were required to leave the capital to defend or testify in suits against the state. *Davis* v. *West Virginia Bridge Commission, supra; Greene* v. *Wolf, supra.*

The policy of the Tucker Act with respect to the choice of forum in the case of original suits for more than $10,000 applies as well to counterclaims for more than $10,000 in excess of the Government's claim.[9] Congress evidently contemplated that suits

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[8] Deering, *Political Code of California*, 1937, Sec. 688; Burns, *Indiana Statutes Annotated*, 1933, Sec. 4–1501; Annotated Laws of Massachusetts, 1933, Vol. 9, c. 258; Mississippi Code of 1930, Sec. 5997; Compiled Statutes of Nebraska, 1922, Sec. 1105, 1107, 1110; Virginia Code of 1930, Sec. 2578; Remington, *Revised Statutes of Washington Annotated*, 1932, Vol. 3, c. 4, Sec. 886; W. Va. Code, 1931, c. 14, Art. 2, Sec. 1; Wisconsin Statutes, 285.01.

[9] It may be doubted whether the estate's indebtedness to the United States in this case arose out of the same transaction on which the counterclaim was based. See *supra*, pp. 21–22; cf. *New York* v. *Dennison*, 84 N. Y. 272. At all events, the Government's claim had been reduced to judgment at the time it was filed in the probate court and the original claim was thus merged in the judgment. The claim of the estate on the contract was therefore technically unrelated to the judgment claim.

for relatively small amounts would not require the attendance of important Government officials and evidently concluded that the inconvenience to the United States in such cases was outweighed by the advantages to the private claimant. But it is clear that Congress deemed the presence of the department heads, and their staffs at the seat of government, essential for the protection of the United States where large demands are involved.

The question must also be viewed with reference to the Attorney General's responsibility for the conduct of the Government's litigation. In 1868 the solicitors of the Court of Claims were placed under the jurisdiction of the Attorney General in order to secure the best representation of the Government. See Congressional Globe, 40th Cong., 1st Sess., pp. 367–8; *id.*, 40th Cong., 2nd Sess., pp. 2764–2768. It is true that since 1870 the district attorneys have been subject to the supervision and control of the Attorney General. But this authority cannot be exercised minutely and may be insufficient to protect the Government's interest in civil litigation involving large amounts and complicated issues.

The present case suggests also questions which may arise if it is held that, by instituting suit on one claim, the United States subjects itself to counterclaims on unrelated matters, including those concerning Government departments or agencies having no direct interest in the original action.

See footnote 9, p. 25.

The Government cannot realistically be assimilated to a single individual for purposes of litigation. If counterclaims may be filed without regard to the limitations prescribed by Congress, it would be difficult to investigate in advance of filing suit what counterclaims might be made affecting the particular department interested in the original action; it would obviously be impossible to make such investigation in every branch of the federal Government. The Government would not be able to take a voluntary nonsuit after the filing of a counterclaim in the federal courts (Rules of Civil Procedure, 41 (a)) and probably would have no absolute right to do so in any state court. Cf. *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 148. While there is no policy that the United States should be permitted to defeat its just obligations, there is substantial reason why the Government should be able to prescribe the forum for the determination of its obligations.

It is unnecessary to inquire in this case whether these considerations require the conclusion that the right to set-off as well as to counterclaim should be denied in the absence of statutory consent. Having complied with the Act of 1797 (R. S., Sec. 951), the respondent was entitled to a set-off up to the amount of the Government's claim. *United States* v. *Wilkins*, 6 Wheat. 135. It has sometimes been urged that even in the absence of statutory consent set-offs should be allowed to the extent necessary to

prevent recovery by the Government for more than is justly owing. But a stay of execution until the defendant could sue on its claim under the Tucker Act would be sufficient to avoid injustice. In any event it is certainly unnecessary to render an affirmative judgment against the Government in order to permit the defendant to make a complete defense. The opinion in *The Gloria* case, it is true, suggests that set-off and counterclaim stand on the same footing, for the reason that a consideration of the merits of a set-off requires a determination whether the United States is indebted to the defendant and that there is therefore no reason why the court should not proceed to enter an affirmative judgment. At best this is an argument of convenience to avoid multiplicity of suit. Such considerations should be entitled to little weight where the Congress has prescribed the forum in which liability may be finally determined. The possible inconvenience to the private litigant was considered by the Congress and found to be an insufficient reason for permitting suit in any court other than the Court of Claims where the demand is in excess of $10,000.

B. THE STATE COURTS ARE WITHOUT AUTHORITY TO ENTER AN AFFIRMATIVE JUDGMENT AGAINST THE UNITED STATES

1. Whether the immunity of the United States from suit without its consent derives from the sovereign status conferred upon the federal Gov-

ernment by the Constitution, or from some other source in that instrument, it is plain that it does have a constitutional origin and is beyond state interference. *United States* v. *Thompson*, 98 U. S. 486, 489, 490. *Monaco* v. *Mississippi*, 292 U. S. 313, 321; *Kansas* v. *United States*, 204 U. S. 331, 342. And whether the immunity of the United States or its instrumentality has been waived in a given case, and if so to what extent, is a federal question, determinable according to congressional intent, express or implied. *Federal Land Bank* v. *Priddy*, 295 U. S. 229; *Minnesota* v. *United States*, 305 U. S. 382; *Buchanan* v. *Alexander*, 4 How. 20. Undoubtedly the same rule applies in determining the extent of the immunity. Compare *Helvering* v. *Gerhardt*, 304 U. S. 405, 411–412; *Pittman* v. *Home Owners' Loan Corporation*, 308 U. S. 21. Accordingly, it is immaterial that this case comes up through the state courts. There is, indeed, no suggestion in the opinion of the court below that it was deciding a state rather than a federal question.

There can be little doubt of the constitutional immunity of the United States from suit in the absence of consent. *Minnesota* v. *United States*, 305 U. S. 382, 388–389; *Stanley* v. *Schwalby*, 162 U. S. 255, 270; *Carr* v. *United States*, 98 U. S. 433, 437; *Buchanan* v. *Alexander*, 4 How. 20. Whether, in the silence of Congress, the Government's immunity extends to counterclaims is a question not presented in this case. The lack of consent to suit is

not founded on the silence of Congress alone. Congress, as we have sought to show, has prescribed the conditions and limits of the liability of the United States to suit and by clear implication declared its immunity from demands for affirmative judgments on counterclaims. Its constitutional power to do so would seem clear. Cf. *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21. The reasonableness of the Congressional determination is sufficiently evidenced by almost a century of judicial precedents.

2. The court below proceeded on the view that the immunity of the United States under the decisions of this Court extends only to original suits and not to counterclaims. There appears to be no suggestion in the opinion below and certainly none in the brief of the respondent that the Government, though otherwise free from unconsented suit on counterclaims, can be required to surrender its immunity as a condition of access to the state courts. Any such suggestion, it seems plain, would be untenable. The State of Michigan has not purported to withdraw from its probate courts jurisdiction to determine all claims against a decedent's estate. And the state probate court must give effect to any right arising under the federal Constitution when asserted in a proceeding within its general jurisdiction. Cf. *Davis* v. *Corona Coal Co.*, 265 U. S. 219, 222–223; *Fauntleroy* v. *Lum*, 210 U. S. 230. The Government's constitutional immunity from suit, like its exemption from the operation

of state statutes of limitations, must therefore be enforced by the state courts. This duty it cannot escape by the pretext of denying jurisdiction to enforce a federal right. *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415; *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230. There would seem to be no occasion, therefore, to consider what requirements the State may lawfully impose as the condition of granting a privilege which the State is free to withhold.

The conclusion would be the same in this case, however, even though the State of Michigan were free to deny the United States access to the courts of the State. A State may not exact as the price of a privilege assent to a condition modifying the distribution of power in the federal system prescribed by the Constitution. Cf. *Terral* v. *Burke Construction Co.*, 257 U. S. 529. To be sure, the immunity here asserted, like many others in the field of governmental relations, may be waived by express consent. But the Congress has withheld its consent in this case. The Attorney General likewise refused consent and, indeed, had no authority to do otherwise. *Stanley* v. *Schwalby*, 162 U. S. 255, 270.

It should be observed moreover that the filing of the claim in the probate court by no means represented a voluntary choice of forum even by the Department of Justice. The state court was the only forum open to the Government. This Court so held in *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, naturally assuming that

the constitutional rights of the United States would be as fully protected in the state courts as in the courts of the Union. See 296 U. S. at 479.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of Michigan should be reversed.

FRANCIS BIDDLE,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
MELVIN H. SIEGEL,
PAUL A. SWEENEY,
Special Assistants to the Attorney General.
THOMAS HARRIS,
Attorney.

FEBRUARY 1940.

APPENDIX

Section 951 of the Revised Statutes (Act of March 3, 1797, c. 20, 1 Stat. 512; 28 U. S. C. sec. 774) provides:

> In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident.

The Tucker Act, Section 24 of the Judicial Code, 28 U. S. C. sec. 41, provides:

> The district courts shall have original jurisdiction as follows:
>
> * * * * *
>
> (20) *Suits against United States.*—Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court

of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * *. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

The Tucker Act, Section 145 of the Judicial Code, 28 U. S. C. sec. 250, provides:

Jurisdiction.—The Court of Claims shall have jurisdiction to hear and determine the following matters:

(1) *Claims against United States.*—First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *

(2) *Set-offs.*—Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided*, That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall

have been rendered and finally acted upon as required by law, unless the General Accounting Office fails to act finally thereon within six months after the account is received in said office.

Section 146 of the Judicial Code, 28 U. S. C. sec. 252, provides:

> *Judgments for set-off or counterclaims.*— Upon the trial of any cause in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the Government against any person making claim against the Government in said court, the court shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such court are enforced.

Section 15682 of Chapter 266 of the Compiled Laws of Michigan (1929) provides:

> Set-offs in settlement of claims. Sec. 9. When a creditor against whom the deceased had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be; but no claim barred by the statute of limitations shall be allowed by the commissioners in favor of or against the estate, as a set-off or otherwise.

Chapter I, Sec. 20, of the Probate Code of Michigan of June 20, 1939 (Michigan Stat. Ann., August 1939 pamphlet, Sec. 27.3178 (20)), provides:

* * * * *

Sec. 20. Each judge of probate shall have power:

1. To administer all oaths necessary in the transaction of business before the probate court, and all oaths required by law to be administered to persons executing trusts under the appointment of such court;

2. To issue all executions, and to issue all warrants and processes in conformity to the rules of law, which may be necessary to compel the attendance of witnesses residing in any part of this state, or to carry into effect any order, sentence or decree of the probate courts, or the powers granted them by law, and to issue warrants directed to any sheriff, constable or other proper officer in this state, requiring him to apprehend and imprison any person who shall refuse or neglect to perform any order, sentence or decree of a probate court, requiring such officer to apprehend and imprison such person in the common jail of the county, until he shall perform such orders, sentence or decree, or be delivered by due course of law; and all such officers shall serve and execute all legal warrants and processes to them directed by any judge of probate; service and enforcement of the executions mentioned in this chapter and the return thereof shall be had in accordance with the law applicable in courts of record;

3. To keep order in his court, and to punish any contempt of his authority, in like manner as such contempt may be punished in the circuit court;

4. And he shall have such other powers as may be conferred by law.

House Report No. 163, 28th Congress, 1st Session (1843–1844):

The very learned and able judge who presided at the trial of the cause sustains the position here taken by the committee, in the conclusion of his written opinion overruling the motion for a new trial. He remarks: "If the verdict be affirmed, it will only be operative, in law, as a judgment for the defendant to preclude the United States from afterwards claiming a balance; but the court can take no further steps to enforce the payment of the balance found due by them, as they could do in a similar case between individuals. The defendant must appeal to another tribunal for ultimate redress, where the whole merits of his claim may be reexamined. Whether it will or ought to be done, does not comport with my duty; but, inasmuch as Congress may act on this subject, according to their own discretion, it is evident the time may be very distant when this controversy may be terminated."

The 4th section of the act of Congress, approved March 3, 1797, gives to all defendants in suits brought by the United States a right to claim, against the demand for which the action has been brought, any credits to which they shall prove themselves entitled, if they have been presented to, and rejected by, the proper accounting officer of the Treasury Department.

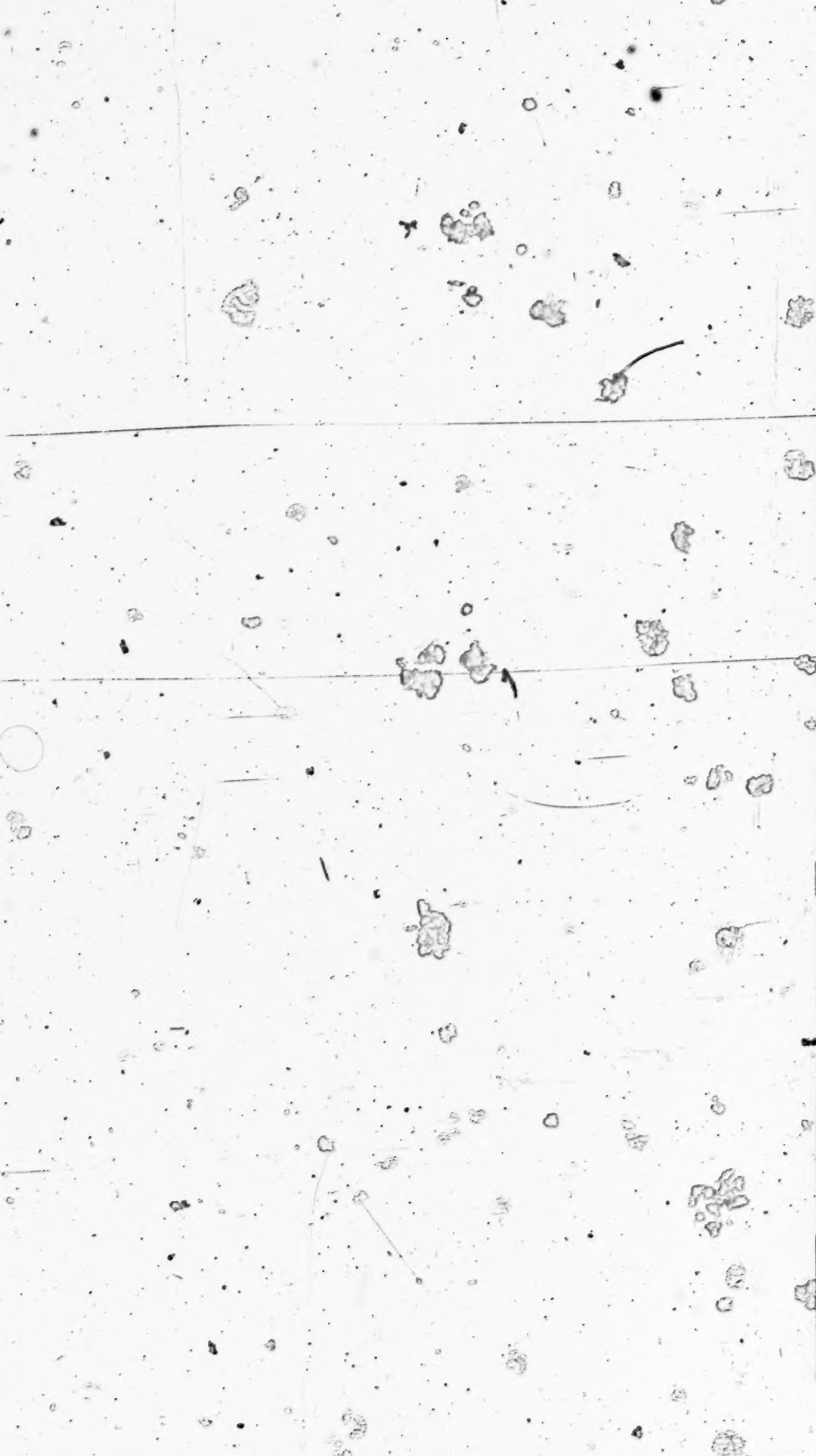
This provision, however, has no other object than to secure to the defendant, under the pleas of payment and set-off, the admission in evidence of his credits to the jury in support of the issue, and to establish his right to a general verdict in his favor; but does not authorize the jury to go further, and declare the defendant to be a creditor of the Government, and so to ascertain and

"certify" the balance that, in law, it shall be binding, and *"shall be deemed a debt of record."*

The United States may happen, in many cases, to be a debtor to the defendant, upon the final adjustment of complicated accounts; but it will require the enactment of a law of Congress to give authority to a jury to place the Government in that predicament, and by their verdict, or by any declaration of opinion accompanying their verdict, to afford evidence of the amount of the debt, so that it can receive the sanction of a judicial judgment, and be established as an incontrovertible or final *"debt of record."* [Emphasis supplied.]

Your committee have not been furnished with any account by the memorialist, nor with any statement of the grounds or facts assumed by the jury, from which they drew the conclusion that the Government was indebted to her late husband in the large amount mentioned in the certificate which was returned with their verdict. The memorialist appears to rely, for the validity and payment of her claim, entirely upon the alleged legal effect of that certificate. But, inasmuch as the committee view the certificate of the jury as extraneous and unauthorized by any law, it affords no evidence of a debt of record against the United States; and, as the judgment rendered on the verdict merely bars the Government from any further demand upon the estate of James Reeside, the claim of the memorialist remains open to be reexamined and adjusted, either by the proper department of the Government, or by an appropriate committee of the House of Representatives.

U. S. GOVERNMENT PRINTING OFFICE: 1940



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No. 570

In the Supreme Court of the United States

OCTOBER TERM, 1939

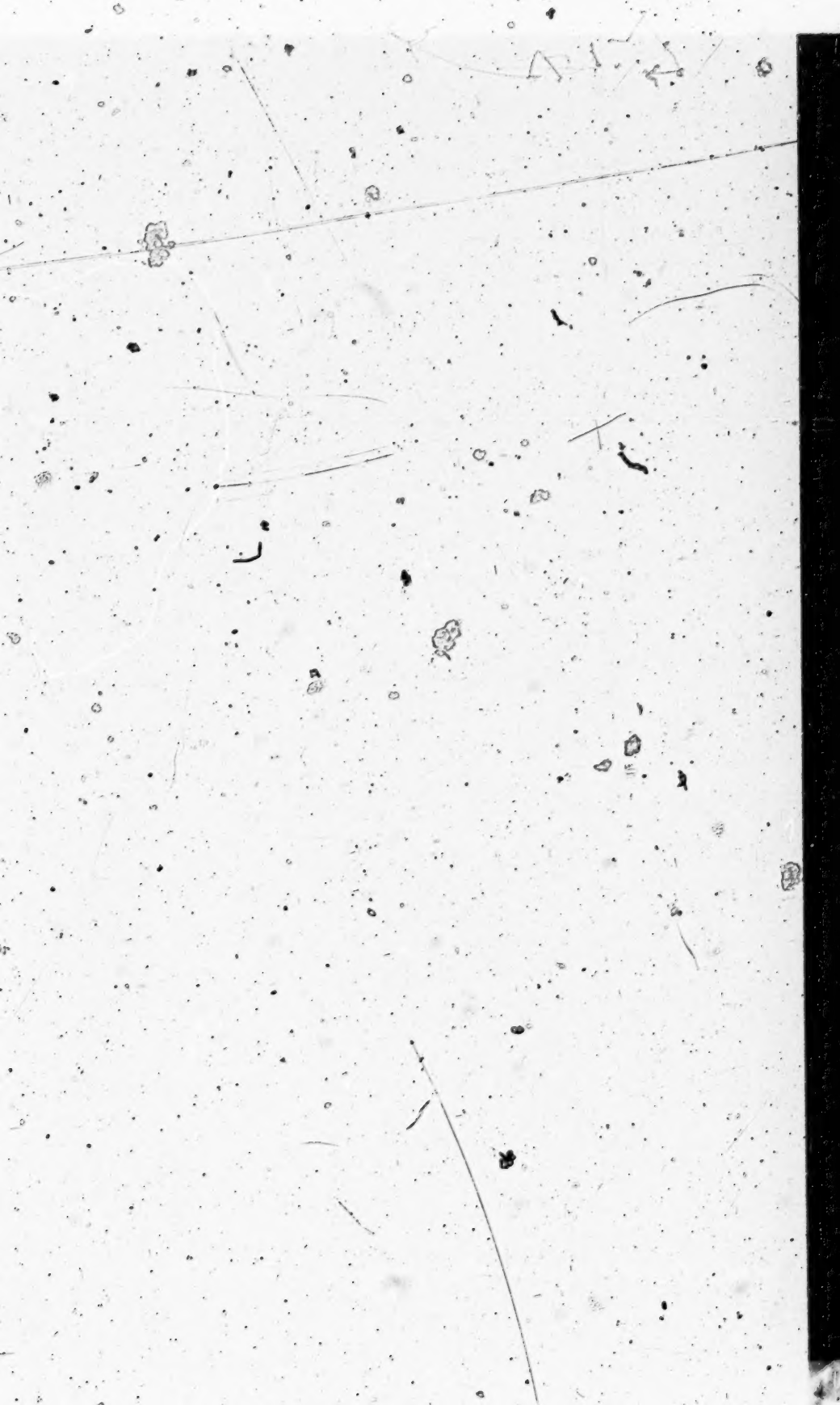
UNITED STATES OF AMERICA, PETITIONER

v.

JOHN C. SHAW, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF SYDNEY C. MCLOUTH, DECEASED

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

REPLY BRIEF FOR THE UNITED STATES



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REPLY BRIEF FOR THE UNITED STATES

ARGUMENT

THE UNITED STATES DID NOT WAIVE ITS IMMUNITY FROM AFFIRMATIVE JUDGMENT BY ITS ASSUMPTION OF THE OBLIGATIONS OF THE FLEET CORPORATION OR BY ITS ALLEGED ACQUISITION OF THE CORPORATION ASSETS IN 1923

The respondent contends that by virtue of an "assignment" of all the assets of the Fleet Corporation to the United States in 1923 and by the express provision of the Act of June 29, 1936, the United States has assumed all the contractual obligations of the Corporation, including the commitment on which the counterclaim here involved is

founded, and that the United States is liable to suit on such obligations in the same manner and to the same extent as the Fleet Corporation was (Brief for Respondent, pp. 40–49).

The respondent's position is untenable. The United States' consent to suit against the Fleet Corporation, express or implied, does not include consent to suit against the United States on obligations of the Corporation assumed by the United States. And, subject to exceptions immaterial in this case, the statutes providing for the assumption of the Corporation's contractual obligations by the United States do not confer consent to suit against the United States to any greater extent than provided in the Tucker Act. The assets of the Fleet Corporation were not "assigned" to the United States in 1923, but even if they were the United States did not thereby subject itself to suit save as expressly provided by statute.

1. The cancellation agreement by which the Fleet Corporation assumed McLouth's commitment to the lumber company was executed on May 24, 1920, and included a provision that the materials furnished McLouth for the performance of the orginal construction contract should remain with McLouth as bailee. (See 281 Mich. 191, 194.) The cancellation agreement was assumed by the Shipping Board pursuant to the Act of June 5, 1920 (c. 250, Sec. 2, 41 Stat. 988; 46 U. S. C., Sec. 862 (b) (1)). The Act of June 29, 1936 (c. 858, Title II, Sec. 203, 49 Stat. 1987; 46 U. S. C.

Supp. IV, Sec. 1113 (a)) abolished the Fleet Corporation and provided that "All existing contractual obligations of the dissolved corporation shall be assumed by the United States."

The assumption by the United States under these statutes of the respondent's commitment to the lumber company has no relation to the acquisition by the United States of its claim against McLouth for conversion. The opinion in *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, 3, it is true, recites that the United States acquired all the assets of the Fleet Corporation in 1923 by assignment. The statement in the opinion appears to be based solely on an allegation in the petition for writ of mandamus admitted by demurrer. (Record, *Skinner & Eddy Corp.* v. *McCarl*, No. 30, October Term, 1927, p. 4). So far as the Government has been able to determine, the statement is without any foundation in fact. According to the files of the Department of Justice, the complaint of the United States in its action to recover for conversion of materials by McLouth did not allege any such assignment, and relied only on the theory that the United States was the owner of the property converted, the Fleet Corporation having acted solely as agent of the United States. Cf. *Russell Wheel & Foundry Co.* v. *United States*, 31 F. (2d) 826 (C. C. A. 6th); *King County, Wash.* v. *United States Ship Board E. F. Corp.*, 282 Fed. 950 (C. C. A. 9th).

2. The right to sue the Fleet Corporation on its contracts does not include the right to sue the

United States on its assumption of the Corporation's contracts, unless the United States has so consented by statute. In authorizing the United States Shipping Board to organize a corporation under the laws of the District of Columbia, the Congress contemplated a corporation with capacity to sue and be sued on contracts and torts. *Sloan Shipyards* v. *United States Fleet Corp.*, 258 U. S. 549, 565. The immunity of the United States, this Court held, did not extend to its corporate agent. See *id.* 567, 568. But the United States did not waive its own immunity by authorizing the creation of the Fleet Corporation. The immunity of the United States is not lost by consent to suit against its agents, and extends to all suits on obligations of the agent assumed by the United States. Compare *Turner* v. *United States*, 248 U. S. 354, 359.

In *Federal Housing Administration, Region No. 4* v. *Burr*, No. 354, October Term, 1939, decided Feb. 12, 1940, this Court held that the Administration's power to "sue and be sued" extended to all civil process, including execution on "funds made available" by the National Housing Act. This Court held further, however, that the right to levy execution did not follow the appropriated funds while in the custody of the Treasury. In *Briggs* v. *Light-Boats*, 11 Allen (Mass.) 157, the United States acquired a vessel from a contractor subject to a lien for labor and materials. The court held, in a learned opinion by Justice Gray, that the lien could not be enforced against the vessel while in

the possession of the United States, though it could have been enforced while in the hands of the contractor. It seems equally clear that the remedies available against the Fleet Corporation for the enforcement of its contractual obligations are not available against the United States on the same obligation save to the extent that the United States has expressly consented. The United States has consented to be sued on this contract only in the Court of Claims.

The respondent relies on *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, and *United States* v. *Buford*, 3 Pet. 12, in which it was held that when the United States sues on a claim acquired after the running of the statute of limitations, the statutory bar may be pleaded as a defense. But these cases are not in point. They proceed on the ground that the usual immunity of the United States from such defenses is founded on a policy to protect the Government against the negligence of its agents and has no application, therefore, where the statute has run because of the negligence of others. See *Guaranty Trust Co.* v. *United States, supra*, at 141. They afford no basis for a contention that the right to sue the Government's agent on a contract follows the contract after its assumption by the United States. The Government's immunity from the defense of laches or statutory limitations, it may be observed, extends to actions on claims acquired from private individuals prior to the running of the statutory period. *United States* v. *Nashville, &c., R'y Co.*, 118 U. S. 120, 126.

3. The statutes of 1920 and 1936 do not confer consent to suit against the United States to the same extent that suit could have been maintained against the Fleet Corporation, but on the contrary evidence a purpose to restrict suits against the United States within the limits prescribed by the Tucker Act. Section 2 (b) (2) of the Act of June 5, 1920, saves all rights and remedies against the Fleet Corporation (*Merchant Fleet Corp.* v. *Harwood*, 281 U. S. 519), but consent to suit against the United States is expressly conferred only to the extent allowed by prior statute. The only provision in the statute conferring a right to suit is Section 2 (c), which permits a person dissatisfied with the award of the Board to accept 75% of the award and sue for the remainder claimed in the manner provided by the Tucker Act. *United States* v. *Skinner & Eddy Corp.*, 35 F. (2d) 889, 903 (C. C. A. 9th). The Act of June 29, 1936, directs the Attorney General to defend all "pending" actions against the Corporation and provides that any judgment obtained "in any such pending suit" should be reported to Congress in the manner provided for reporting judgments against the United States.

It will be observed that the Shipping Board assumed only the "contracts or agreements" of the Corporation under the Act of June 5, 1920, and the United States assumed only the "contractual obligations" in 1936. Congress evidently had in view the jurisdictional limitations of the Tucker

Act. Moreover, the Act of June 29, 1936, makes express provision for the defense of "pending" suits by the United States and the payment of any judgments in such "pending" suits, thus evidencing a purpose not to subject the United States to suit in the manner permitted against the Fleet Corporation in any other cases.

4. The respondent asserts that in 1923 the United States acquired all the assets of the Fleet Corporation by assignment, including the claim for conversion on which the Government's judgment was obtained, and thereby assumed all the Corporation's obligations (Brief for Respondent, pp. 42–43). The statement is unfounded in fact, as we have said, but even if the facts asserted were true, the United States' liability to suit by virtue of such an "assignment" would be no greater than that resulting from the operations of the Acts of June 5, 1920, and June 29, 1936. Moreover, adoption of the theory of implied assumption apart from statute would lead to the untenable view that the United States became subject to all the Corporation's obligations, including tort liabilities.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of Michigan should be reversed.

FRANCIS BIDDLE,
Solicitor General.

FEBRUARY 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

FILE COPY

In The

Supreme Court of the United States

October Term, 1939.

No. 570.

UNITED STATES OF AMERICA,

Petitioner,

v.

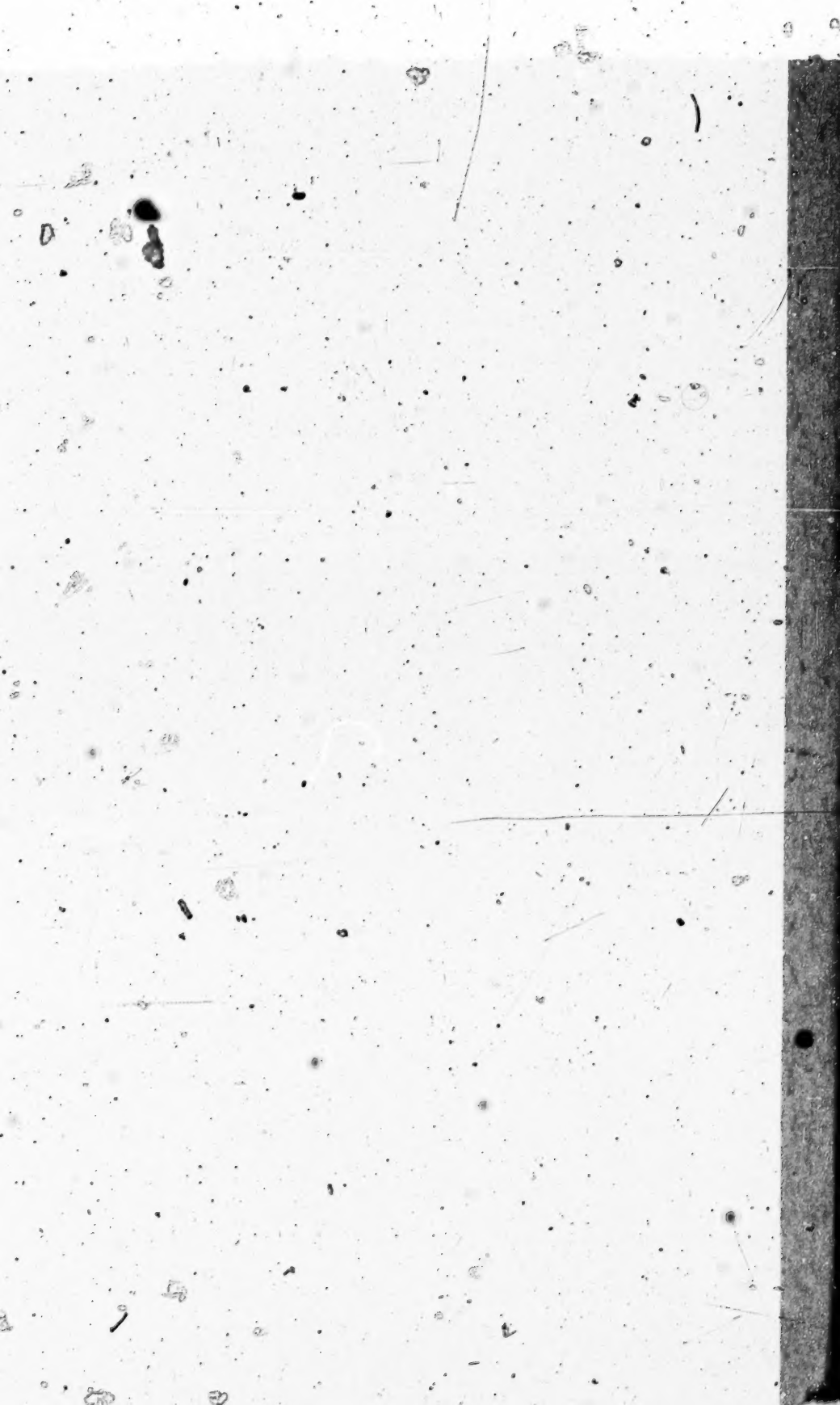
JOHN C. SHAW, Administrator De Bonis Non of the Estate of Sydney C. McLouth, Deceased.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF FOR RESPONDENT IN OPPOSITION.

SHIRLEY STEWART,
EUGENE F. BLACK,
HOWELL VAN AUKEN,
Counsel for Respondent.

NATIONAL LAW PRINTING CORPORATION, 4423-29 Field Avenue, Detroit, Michigan
PLaza 7117



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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Supreme Court of Michigan is now officially reported in Volume 290 of Michigan Reports, at page 311.

JURISDICTION.

Jurisdiction is invoked under Section 237 (b) of the Judicial Code on allegation that the decision denied an immunity claimed by petitioner under the Constitution and statutes of the United States.

QUESTION PRESENTED.

It is respectfully suggested that petitioner's statement of presented question is inaccurate and that the true question is:

Where the United States voluntarily presents a claim against a decedent's estate in a state probate court and prosecutes such claim to final judicial determination in such court, and where a set-off against such claim is duly asserted and ultimately upheld on the merits by a final judgment of the highest court of such state, does such probate court, on remand, possess jurisdiction to enter an order in accordance with the local statutory practice by which the excess of the adjudicated set-off over the claim is "ascertained and allowed"?

STATEMENT OF THE CASE.

Petitioner's Statement of the Case omits the following material facts:

The merits of the instant set-off, and the Fleet Corporation's obligation to pay it, were adjudicated and placed at rest by judgment of the Michigan Supreme Court on *former appeal (In re McLouth's Estate, 281 Mich. 191)*.

That decision was rendered in 1937, and no review was ever sought in the present court.

So that this court may readily comprehend the various proceedings which were taken in the Michigan courts and the consequent finality of such judgment, we respectfully submit the following outline taken chronologically from the reported cases:

In May of 1920 U. S. Shipping Board Emergency Fleet Corporation, acting in behalf of the United States, undertook with McLouth for consideration to assume and pay his certain debt to Ingram-Day Lumber Company. See both opinions of Michigan Supreme Court—*281 Mich. 191; 290 Mich. 311.* The debt not being paid, Ingram-Day Lumber Company sued McLouth. The Government and its own staff of attorneys took complete charge of McLouth's defense, but were unsuccessful, and judgment against McLouth's administrator in the sum of $42,789.96 was ultimately recovered. *(Ingram-Day Lumber Company v. McLouth, 275 U. S. 471).* This judgment was thereafter duly allowed (by the Michigan Probate Court holding jurisdiction over the estate) as a proper claim against McLouth's Estate in the sum of $58,089.04, including interests and costs (R. 14, 15).

In June of 1933 the United States, as a result of supplemental contractual dealings between McLouth and the Fleet Corporation, recovered its own judgment against McLouth's administrator in the sum of $40,165.40, which was duly affirmed on appeal *(Shaw v. United States, 75 Fed. 2nd 175).* This judgment was made the basis of a claim which was duly presented by the Government with petition to such Probate Court for due allowance thereof. In accordance with local statutory practice the administrator exhibited.

and proved, in offset, the Ingram-Day claim and the Government's covenant to assume and pay same. On first hearing the probate court allowed the Government's claim and disallowed the set-off. On appeal to the Circuit Court of Michigan (an appellate court in probate cases),[1] the Probate Court's order was reversed and the set-off was upheld. On appeal to the Supreme Court of Michigan, the Circuit Court's judgment was affirmed *(281 Mich. 191)* and the case was remanded to the Probate Court with instructions.

One question only was left open for decision by the Probate Court on such remand (R. 14, 43). That question was: should statutory "ascertainment and allowance" be made of the excess of the adjudicated set-off over the claim as presented? (R. 42). Such question was resolved in favor of the estate by order of the Probate Court (R. 16) and the order was duly affirmed on appeal to the Supreme Court of Michigan. The latter court's judgment of affirmance is the decision sought to be reviewed by the instant pplication for writ of certiorari.

1. See collection of cases in opinion of Michigan Supreme Court (R. 74).

SUMMARY OF ARGUMENT.

POINT A.

There is no special or important reason for issuance of writ because: (a) The Government's obligation to the estate was adjudicated by a now final judgment of the Michigan Supreme Court; (b) There is no question as to the fact or amount of the adjudicated obligation, and (c) The question of affirmative ascertainment of amount is consequently unsubstantial and goes to the mere form of a lower court judgment on remand.

POINT B.

Regardless of whether an affirmative judgment for the excess of a set-off may be entered against the Government in a suit instituted by it, the instant probate court order as affirmed by the Michigan Supreme Court constitutes at most a permitted judicial ascertainment that, on striking a balance of just demands, the Government is indebted to the estate in an ascertained amount. The order is consequently in accord with, and does not vary from, the early decisions of this court that are relied upon by petitioner.

POINT C.

The probate court's order, whether it be termed a judgment or judicial determination of amount, was eminently proper under the decisions of this court.

ARGUMENT.

POINT A.

There is no special or important reason for issuance of writ.

More than 19 years ago the United States, acting through its agent, The Fleet Corporation, undertook with McLouth that it would assume and pay his debt to Ingram-Day Lumber Company. The promise has never been kept and the Government has meanwhile shamefully litigated Ingram-Day Lumber Company and a small estate through twelve separate decisions of various state and federal courts in continual effort to evade its promise. Notwithstanding that Congress once enacted a bill for payment of the debt to Ingram-Day Lumber Company,[2] and notwithstanding that the reason for Presidential veto of the bill[3] has now been satisfied through *pro tanto* application of the Government's claim to the Ingram-Day debt, the Government continues this litigation in repudiation of its promise even though there is now no question as to the fact or amount of its adjudicated liability.

We allude to these facts as evidence that there are special and important reasons why the Government should not be permitted to prolong this litigation and that its litigious conduct should incline this court's discretion against issuance of the applied for writ. The instant petition for certiorari is necessarily reduced to conten-

2. *73rd Congress, 2nd Session, H. R. 7615, S. 854.*

3. The bill was vetoed by President Roosevelt for the following reason: "Disapproved because no provision is made for the Government's counterclaim." *Congressional Record, Vol. 78, Part 11, Page 12457.*

tion that the Government's admitted liability should not be recorded by formal judicial determination and, in such connection, it is respectfully emphasized that the Supreme Court of Michigan, on former appeal *(281 Mich. 191)*, made final ruling that the United States was liable for payment of the Ingram-Day claim as filed and allowed against the estate (amount and date of allowance shown on pages 14 and 15 of record).[4]

If there could be any claim that the United States is not liable in fact to the amount ascertained by the Courts of Michigan, then a meritorious reason for review might exist. However, in the absence of such claim (either in the Michigan Supreme Court or in the instant petition) and in view of the presumption by this court that there was substantial evidence to sustain the lower court's order *(Neblett v. Carpenter, 305 U. S. 297)*, it is submitted that no Federal question of substance is involved and that there is no special or important reason for issuance of writ. This court made final adjudication, in *Ingram-Day Lumber Company v. McLouth, 275 U. S. 471*, of the fact and amount of McLouth's debt to Ingram-Day Lumber Company, and the Supreme Court of Michigan made final adjudication of the Government's liability to pay such debt. We quote from the Michigan Supreme Court's opinion on such former appeal *(281 Mich., at page 200)*:

> "The judgment *(275 U. S. 471)* became the liability of appellant (United States) either as principal or as assignee of the Fleet Corporation."

Consequently, the question for present review relates only to the mere form of final order on remand. The

4. Furthermore, the Government having unsuccessfully defended McLouth in the *Ingram-Day case*, became thereby concluded as to its liability over. *Washington Gas Company v. District of Columbia, 161 U. S. 329.*

Government's liability, as determined on former appeal, is not increased or adversely affected by a "judicial ascertainment" of the uncontroverted amount, and the order in question merely determines and formally records same.

POINT B.

The probate court's order is a judicial ascertainment of amount only and does not constitute a money judgment against the United States.

The solicitor general alleges that the Michigan Supreme Court has decided the question sought to be reviewed in a way not in accord with *United States v. Eckford, 6 Wall. (73 U. S.) 487.* Primarily, therefore, we cite the following excerpt from the *Eckford* decision:

> "Without extending the argument, we adopt the views expressed by this court in the case of *De Groot v. United States*, decided at the last term, that when the United States is plaintiff and the defendant has pleaded a set-off, which the Acts of Congress have authorized him to do, no judgment can be rendered against the Government, although it may be judicially ascertained that, on striking a balance of just demands, the Government is indebted to the defendant in an ascertained amount."

It is at once apparent that the solicitor general offers no argument to the point that a money judgment, as distinguished from a judicial ascertainment of amount, was entered by the Probate Court and approved by the Michigan Supreme Court. As evidence that the Probate Court did not and could not enter a money judgment as

distinguished from a judicial determination of amount owing, we respectfully present the following review of the powers and jurisdiction of such Probate Court.

The general powers and jurisdiction of the court are defined and declared by Sections 15519 and 15520 of the Michigan Compiled Laws of 1929 (Mich. Stat. Ann. 27.2619; 27.2620), and we quote same in full as follows:

> "Each judge of probate shall have jurisdiction:
>
> 1. Of all matters relating to the settlement of the estates of all deceased persons, whether testate or intestate, who were at the time of their decease inhabitants of, or residents in his county, and of all who shall die without the state leaving any estate within such county to be administered;
>
> 2. Of trusts and trustees in the execution of wills and administration of estates of deceased persons;
>
> 3. To appoint guardians to minors and others in the cases prescribed by law, and of the settlement of the estates of such minors and others under guardianship;
>
> 4. Of all cases of juvenile delinquents and dependents;
>
> 5. And shall have and exercise all such other powers and jurisdiction as are or may be conferred by law;
>
> 6. And to that end he may, upon the filing in said court of a petition therein, within ninety (90) days of the original hearing, or of the rendering or making of any order, sentence or decree, as the case may be, and after due notice to all parties interested, grant rehearings, and may modify and set aside orders, sentences and decrees rendered in such court: Provided, however, That the jurisdiction conferred by this section shall not be construed to deprive the circuit court in chancery in the proper county of concurrent jurisdiction as originally exercised over the same matter."

"Each judge of probate shall have power:

1. To administer all oaths necessary in the transaction of business before the probate court, and all oaths required by law to be administered to persons executing trusts under the appointment of such court;

2. To issue all warrants and processes in conformity to the rules of law, which may be necessary to compel the attendance of witnesses residing in any part of this state, or to carry into effect any order, sentence or decree of the probate courts, or the powers granted them by law, and to issue warrants directed to any sheriff, constable or other proper officer in this state, requiring him to apprehend and imprison any person who shall refuse or neglect to perform any order, sentence or decree of a probate court, requiring such officer to apprehend and imprison such person in the common jail of the county, until he shall perform such orders, sentence or decree, or be delivered by due course of law; and all such officers shall serve and execute all legal warrants and processes to them directed by any judge of probate;

3. To keep order in his court, and to punish any contempt of his authority, in like manner as such contempt may be punished in the circuit court;

4. And shall have such other powers as may be conferred by law."

It is noted that no power to enter judgment, money or otherwise, is conferred, and that no power to issue execution is granted. We represent that the adjudicating power and jurisdiction of the probate court is limited to orders, sentences and decrees; that proceedings in such court are essentially *in rem* and are not *inter partes*, and that the powers of the court are purely statutory.

In *Holbrook v. Cook, 5 Mich. 225*, it was relevantly declared:

"It is true probate courts are 'courts of record,' being declared to be such by the constitution, but

they are not 'courts of law,' according to the ordinary use of the term. They derive their origin and jurisdiction from a source altogether distinct from the common law, and they exercise no functions peculiar to that system. Parties cannot litigate questions of fact in them, except in the instance of probate of wills, or when the power of appointment is to be exercised; and then no issues are joined by pleadings, no juries are known, *and they render no judgments—their determinations being called orders, sentences or decrees*—and upon summary inquiry, with or without notice, as the case may be."

In a recent case *(In re Quinney's Estate, 287 Mich. 335)* the Michigan Supreme Court made exhaustive collection of the authorities which support our representation that, because no statute grants the power, the probate court is without jurisdiction to render money judgments. On the strength of eighteen cases which were cited or quoted from, the court reaffirmed the following:

"The probate court derives none of its jurisdiction or power from the common law, *Grady v. Hughes, 64 Mich. 540*, but must find the warrant for all its doings in the statute."

In *Smith v. Shawhan, 37 Iowa 533*, the distinction between a judgment and a probate court order of allowance was clearly stated in the following language:

"One of the necessary incidents of every judgment is its means of enforcement by execution. An order of the county court allowing a claim against an estate and ordering the payment of such claim cannot be thus enforced. The county court has no power to issue execution upon such an order. We are of opinion that the filing and allowance of the plaintiff's claim in the county court did not constitute a 'judgment,' in the sense in which that term is used in the clause of the statute of limitations which we have been considering, and consequently that the claim of

the plaintiff is not barred as a judgment of a court not of record."

With the foregoing authorities in mind, we respectfully submit that the probate court did not, by its presently criticized order, enter a money judgment against the United States. The statutory limitation of its powers, and the very wording of the particular statute under which it assumed to act, clearly show that a judicial ascertainment of amount is all that could have been or was done. The statute in question provides:

> "When a creditor against whom the deceased had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be; but no claim barred by the statute of limitations shall be allowed by the commissioners in favor of or against the estate, as a set-off or otherwise."

Compiled Laws Michigan, 1929, Section 15682 (Mich. Stat. Ann. 27.2829).[5]

Attention is respectfully directed to a most striking similarity of language and phraseology. The *Eckford case* permits "judicial ascertainment that, on striking a balance of just demands, the Government is indebted to the defendant in an ascertained amount." The Michigan statutes directs that the commissioners on claims (or court acting in their stead as the case may be) "shall ascertain and allow the balance against or in favor of the

5. By another statute (Compiled Laws, Michigan, 1929, Section 15681; Mich. Stat. Ann. 27.2828) the Probate Judge may, in his discretion, act in the place and stead of Commissioners on Claims. He did so throughout the proceedings which were instituted by the Government in the present case (R. 9, 15, 17).

estate as they shall find the same to be." No power to direct or command payment of the ascertained amount, or power to issue execution therefor, is expressed and, as will be seen from authorities cited above, none can be implied.

It may be inquired: What is the status of a similar statutory ascertainment of balance as against a private claimant? The answer is that such a determination can be made enforceable only by suing out of a writ of *scire facias* thereon in a court competent to render money judgments and issue execution. *Cf. Reeside v. Walker, 11 How. (52 U. S.) 288, 289.* Michigan retains the common law writ of *scire facias* and permits actions in its circuit courts thereon. *McRoberts v. Lyon, 79 Mich. 33.*

It is submitted that the distinction made by the *Eckford case* between a judgment on the one hand and a judicial ascertainment or determination of amount on the other, is clear, and that the instant probate court order qualifies in every respect for accord therewith. This court obviously intended, when it declared decision in the *Eckford* and *DeGroot cases,* to preserve the sovereign dignity from the command of a judgment and yet, in the interest of complete adjudication and early settlement of dispute, to permit judicial ascertainment of amount owing by either party on striking a balance of proper demands.[6]

---

6. The instant set-off was duly presented and rejected under Section 951 of the Revised Statutes. See recorded concession of the fact in 281 Mich. at page 198. Construing said Section 951 the Court of Appeals of the Ninth Circuit said *(United States v. Skinner & Eddy Corp., 35 Fed. 2nd 889):*

> "The Congress of the United States, as early as 1797, granted the right to sue the Government by way of claims for credit, solely as a defense in suits brought by it, *and incidentally to adjudicate the amount of such claims where they had been presented to the accounting officers of the Treasury and by them disallowed in whole or in part."*

This court denied certiorari *(299 U. S. 563)* to review *United States v. National City Bank, 83 Fed. (2d) 236, 106 A. L. R. 1235.* In that case the court of appeals of the Second Circuit upheld an affirmative ascertainment of amount owing by the Russian Government (the United States was substituted *pendente lite* for the Russian Government as plaintiff and appellant) on determination of claim and counterclaim. We take the following from the affirmed District Court opinion *(4 Fed. Supp. 417)*:

> "The offset must therefore be allowed, and this involves a determination of the amount of it. Injustice to the defendant would be prevented by merely finding that the offset is sufficient to defeat the plaintiff's recovery, but equity ought not to leave the adjudication incomplete. There should be a determination of the exact amount due to the National City Bank, without, of course, any direction that the plaintiff pay the excess or that it be subject to a judgment for the excess.
>
> Settle decree accordingly, but without costs."

It is said that the doctrine of *United States v. The Thekla, 266 U. S. 340,* which was followed and applied by the courts below, is narrowly limited to collision cases and has no application to the ordinary common law action *in personam.*[7] *Danforth v. United States, 102 Fed. (2) 5* (reversed in part and affirmed in part by this court December 4, 1939—No. 309) is cited in support. Momentarily assuming but not conceding[8] that to be true, is not the doctrine of *The Thekla* yet applicable here?

---

7. The same contention was made on page 10 of the petition for certiorari in *United States v. National City Bank (299 U. S. 563).*

8. The contention was discredited by reasoned argument of Judge Mack in *The Gloria, 286 Fed. 488,* likewise in *United States v. Moscow-Idaho Seed Company, 92 Fed. (2d) (C. C. A. 9) 170,* and *The Barbara Cates, 17 Fed. Supp. (D. C. Pa.) 241.* In last case *Nassau Smelting Works v. United States, 266 U. S. 101,* is distinguished from present situation at page 241. See also treatment of this question by Michigan Supreme Court, R. 77.

Proceedings in a Michigan Probate Court, like proceedings against a ship in admiralty, are essentially *in rem* to determine the status of the *res*, and are not proceedings *inter partes*.

Allison v. Smith, 16 Mich. 405;
People ex rel. Fraser v. Wayne Circuit Judge, 39 Mich. 198;
Mower's Appeal, 48 Mich. 441;
Stevens v. Hope, 52 Mich. 65;
Mich. Miss. Society v. Corning, 164 Mich. 396;
In Re Brown's Estate, 198 Mich. 563;
In Re Meredith's Estate, 275 Mich. 295;
Montgomery v. Wayne Circuit Judge, 284 Mich. 430.

The proceedings being *in rem*, it is submitted that there is no essential difference between a determination of libel and cross libel in admiralty and a determination of claim and counterclaim in a Michigan Probate Court. The Government, by its voluntary institution of a local proceeding to impress and enforce a lien *(Lafferty v. People's Savings Bank, 76 Mich. 35)* on the *res*, is bound by the local rules of procedure and law of substantive rights. It was so held as against a National Bank receiver who voluntarily filed claim against an estate in the Probate Court of Illinois *(Pufahl v. Parks, 299 U. S. 226)*,[9] and we respectfully suggest that the voluntary filing of a claim against the *res* in control of a Michigan Probate Court, whether by the United States or by a citizen, fits the act of submission to what was said in *The*

9. This court said: "The receiver may, as petitioner elected to do, prosecute his claim in a state court. If he does, at least in the absence of congressional declaration to the contrary, the litigation will be governed by the common and statutory law of the state. Thus the local statute of limitations applies and the local law as to the extinguishment of the estate and the liability *vel non* of distributees controls."

Thekla, viz., "As has been said in other cases, the question of damages to the colliding vessel necessarily arose [10] and it is reasonable for the court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States."

POINT C.

The probate court's order, whether it be termed a judgment or judicial determination of amount, was eminently proper under the decisions of this court.

An able and prophetic review of this question, and of its historical development and progress, was made by Judge Mack in *The Gloria, 286 Fed. 188.* We adopt its relevant context as follows:

> "As the right of set-off and counterclaim gradually comes to be regarded as affecting the substantive rights of the litigants, one would expect to find courts reluctant to give judgment in favor of a sovereign state, where judgment would, in the circumstances, be denied a private litigant because of the right of set-off or counterclaim. Once the first hurdle is past, and it is recognized that the defendant in suit brought by a sovereign state is not limited in his defense to strict common law recoupment, but may assert the broader right of set-off, it may be expected that a modern court of equity, of admiralty, or even of law will be impatient of any restrictions on its jurisdiction to determine judicially all questions involved in the controversy or controversies submitted. While a court may have no power

10. In the present case the question of counterclaim necessarily arose in the Probate Court by command of the only statute under which the court might proceed in view of the actual existence and exhibition of the estate's counterclaim. The statute is peremptory.

to enforce an affirmative judgment against a sovereign state, still if, as a defense to a suit instituted by a sovereign state, a counterclaim or set-off is asserted, it would seem only proper that the court determine all issues fairly before it, even though it involve a finding that the plaintiff state was indebted to the defendant. A modern court should strive to do complete justice; a partial and incomplete adjudication tends only to protract and complicate litigation to the detriment of all concerned. A partial and incomplete adjudication leaves all parties in grave doubt as to their status and rights, and leads to a multiplicity of suits.

"A sovereign state, generally speaking, is not obliged to go into court; but, if it seeks the assistance of the court, it would seem to be in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction of the court in respect of any set-off or counterclaim properly assertable as a defense in a similar suit between private litigants. Although, perhaps, the defendant should not be permitted to assert any counterclaim which would not be, in whole or part, a defense to the action brought by the state, yet, if it is necessary to examine a counterclaim for the purpose of determining whether there is a defense to the original action, it would seem inconsistent with the duty of a court of general jurisdiction to do complete justice for the court not to determine the whole nature and extent of the counterclaim, even though it involved incidentally a determination that a sovereign state was indebted or obligated to the defendant.

"There is no principle of public law exempting a sovereign state from its obligations under the law. It should not be assumed that a state desires to deny or evade its obligations. There may be sound reasons of public policy why a state should be immune from the harassment of litigation in forums and under conditions not agreeable to the state. But, once the state has chosen its forum, there seems little reason in law or policy why it should not be subject

to the substantive requirements of law and justice."

"Most of the early cases in the United States Supreme Court arose in connection with the Act of Congress of March 3, 1797 (1 Stat. 512), which provided, among other things, that, where a suit is instituted against any person indebted to the United States, the court shall on motion grant judgment at the return term, unless the defendant shall in open court, make oath or affirmation that he is equitable entitled to credits, which had been previous to the commencement of the suit, submitted to the consideration of the accounting officer and rejected. Although it may be doubted whether at this early stage anything more than the strict and limited right of recoupment would, in the absence of statute, have been recognized, it was supposed at one time that the statute authorized the court to render an affirmative judgment against the Government for any balance found due the defendant, and there were some judgments of the Circuit Courts to that effect. But the Supreme Court drew back from what was apparently regarded at that time as a radical innovation.

"In *Reeside v. Walker, 11 How. 272, 13 L. Ed. 693*, the Circuit Court had rendered an affirmative judgment against the Government and the judgment creditor sought to mandamus the Secretary of the Treasury to pay the same. The Supreme Court, denying the mandamus, held, *obiter dictum*, that an affirmative judgment could not be rendered against the Government. *No attempt apparently was made by court or counsel to distinguish the rendering of the judgment from its enforcement.* In *De Groot v. United States, 5 Wall. 419, 427, 433 (18 L. Ed. 700)*, in the course of his opinion, Miller, J., stated:

> 'The Government of the United States cannot be sued for a claim or demand against it without its consent. This rule is carried so far by this court, that it has been held that when the United States is plaintiff in one of the federal courts, and the defendant has pleaded a set-off which the

acts of Congress have authorized him to rely on, no judgment can be rendered against the Government, although it may be judicially ascertained that on striking a balance of just demands the Government is indebted to the defendant in an ascertained amount. And if the United States shall sue an individual in any of her courts, and fail to establish a claim, no judgment can be rendered for the costs expended by the defendant in his defense.'

"In *United States v. Eckford, 6 Wall. 484, 489, 18 L. Ed. 920,* the Court of Claims had considered itself conclusively bound by a judgment rendered by a Circuit Court against the Government, in a suit brought thereon in the Court of Claims. The Supreme Court went much further than was required for the purposes of the decision; in reversing the Court of Claims, Justice Clifford said:

'* * * Without extending the argument, we adopt the views expressed by this court in the case of *De Groot v. United States,* decided at the last term, that when the United States is plaintiff and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the Government, although it may be judicially ascertained that, on striking a balance of just demands, the Government is indebted to the defendant in an ascertained amount.'

"The next important decision is *The Siren, 7 Wall. 152, 154, 19 L. Ed. 129.* The Siren, while in charge of a prize crew, negligently ran into and sank the sloop Harper. The Siren, having subsequently been condemned as prize, the owners of the Harper asserted a claim for her, and her proceeds for the damages sustained by the collision. The claim was allowed by the Supreme Court, and it is interesting to note that, while the court still is inclined to limit the right of affirmative relief against the Government, it views the right of counterclaim and set-off against the Government, which has asked

the aid of the court, as a substantive requirement of equity and justice rather than a statutory privilege. The language of Justice Field is significant in showing the steady development of judicial thought:

> 'But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy.' "

"In *Case v. Terrell, 11 Wall. 199, 20 L. Ed. 134*, the Supreme Court set aside an affirmative judgment rendered against the Government, but there the Government had not been made a party to the suit and had in no manner appeared in the case.

"In *Lee v. Kaufman, 15 Fed. Cas. 162, 198-199*, the Circuit Court, on the basis of the above decisions and on the assumption that no affirmative judgment could be rendered against the Government on a counterclaim, discussed the question whether it was proper none the less for the court to ascertain the amount due the citizen. As to this Judge Hughes said:

> 'Although a moneyed judgment cannot be rendered against the Government except where authorized by law, the mere fact that it cannot be, does not of itself suffice to defeat the jurisdiction of a court to ascertain what is due the citizen.'

"In *Schaumburg v. United States, 103 U. S. 667, 26 L. Ed. 599*, the Circuit Court had refused to

grant an affirmative judgment against the Government, and an appeal was taken to the Supreme Court. While the Supreme Court, relying on its earlier opinions, refused to reverse the lower court, it did indicate that the court might in a proper case permit the jury to certify the balance due from the Government. The words of Justice Miller were:

'While sometimes the jury have been permitted to certify to a balance they find to be due from the Government in cases of this kind, and under some circumstances it may be proper they should do so, a refusal of the court to direct that it be done cannot be reviewed here.'

"*The Nuestra Senora de Regla, 108 U. S. 92, 2 Sup. Ct. 287, 27 L. Ed. 662,* and *The Paquete Habana, 189 U. S. 453, 23 Sup. Ct. 593, 47 L. Ed. 900,* mark a considerable advance in the view of of the court. Both of these were prize cases; both were cases of wrongful seizure by the Government. And in both cases the court rendered on the counterclaim filed an affirmative decree in favor of the claimant and against the Government as libelant. *It may be possible to urge that a peculiar rule obtains in prize cases, but it is difficult to say that the court based its decisions on any such narrow ground.* Indeed, in *The Paquete Habana,* counsel for the claimant, apparently fearing that the court might draw back from the broad ground taken in *The Nuestra Senora de Regla,* argued that the claim of the owner of the vessel seized was simply for restitution of the property or its cash equivalent. *The court did not, however, adopt any restricted theory of this kind. It placed its decisions on the broad principle of modern law that, the Government having come into the court, the court would determine all questions necessary for the disposition of the entire controversy.* That being the case, the court properly embodied its determinations in the form of a decree. *It distinguished,* what it had failed to distinguish in the earlier cases, *the rendering of an affirmative judgment or decree from its enforcement or execution.*

"As the advance, which the decisions in *The Nuestra Senora de Regla* and *The Paquete Habana* mark in the law, has not been as widely recognized as might be expected, it seems to be worth while to quote at length passages relied upon.

"In *The Nuestra Senora de Regla, supra,* Chief Justice Waite, speaking for the United court, says:

'The first of the remaining questions to be considered is whether a decree can be entered against the United States for damages. * * * It is true any judgment that may be rendered [against the United States] cannot be judicially enforced, but the questions to be settled are judicial in their character, and are incidents to the suit which the United States were required to bring to enforce their rights as captors. * * * When, therefore, the United States, through the executive of the nation, waived their right to exemption from suit, and asked the prize court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, we think the Government is bound by the submission, and that it is the duty of the court to proceed to the final determination of all the questions legitimately involved.'"

"The opinion in *The Paquete Habana, supra,* was written by Mr. Justice Holmes. The pertinent part of the opinion follows:

'The decree must run against the United States, if a decree is to be made. In *The Nuestra Senora de Regla, 108 U. S. 92, 102,* the court was of the opinion that the United States had submitted to the jurisdiction of the court so far as to warrant the ascertainment of damages according to the rules applicable to private persons in like cases. It seems to us that the facts here are not less strong. Decrees in cases which disclose no special circumstances have been recognized by subsequent statutes providing for their payment. The *Glen. Blatchf. Prize Cases, 375, Act of February 13, 1864, c. 10, 13 Stat. 575; Labuan, Blatchf. Prize Cases, 165, Act of July 7, 1870, c. 220, 16 Stat.*

649; Sybil, Blatchf. Prize Cases, 615, Act of July 8, 1870, c. 231, 16 Stat. 650; Flying Scud, 6 Wall. 263, Act of July 7, 1870, c. 219, 16 Stat. 649. See, also, *16 Stat. 650, c. 232; Id. 651, c. 234.'"*

Judge Mack was duly affirmed by this court in *United States v. The Thekla, 266 U. S. 340.* The wholesome doctrine of the *Thekla* has since shaped decision in *United States v. National City Bank, 83 Fed. (2) 236, 106 A. L. R. 1235 (certiorari denied, 299 U. S. 563); American P. and Mfg. Company v. United States, 300 U. S. 476; Guaranty Trust Company v. United States, 304 U. S. 134; United States v. United States Fidelity & Guaranty Company, 106 Fed. (2) 804,* plus a number of lesser court cases, and it is submitted that this rule, now wholly approved, marks completion of a decidedly progressive advancement in judicial thought. During the past twenty years the Government has done a great portion of its work through a constantly increasing number of corporations created by acts of Congress. The functions of these corporations have spread to and are interlaced in the lives and business of the farmer, the laborer and the business man. If these corporations are to function expeditiously; if citizens are to be encouraged in dealing with them, the courts should be unhampered in judicial adjustment and measurement of their undertakings. As this court noted in *Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 389:*

"Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of Government in economic affairs have greatly extended the use of independent corporate facilities for Governmental ends. In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such

corporations discharging Governmental functions, and without exception the authority to-sue-and-be-sued was included.

Such a firm practice is partly an indication of the present climate of opinion which has brought Governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope."

The instant claim and counterclaim grew out of contractual obligations undertaken between McLouth and one of these Governmental entities, i. e., the Emergency Fleet Corporation. The latter has recently been dissolved and its contractual obligations have been voluntarily assumed by the United States (Merchant Marine Act, June 29, 1936, c. 858, Title II, Sec. 203, 49 Stat. 1987). The contractual obligation of the Fleet Corporation to McLouth's estate has been adjudicated. Can there remain any legal or moral bar to judicial computation of amount and recording thereof?

CONCLUSION.

The justice of this case is too plain for argument. Litigation extending into its twentieth year should not be prolonged in the absence of compelling reason and the obligation of the United States to McLouth estate has been settled by final decision which is now more than two years old. If it were ever important that this court review the jurisdiction of the Probate Court, that review should have been sought in 1937 when the record presented the facts, circumstances and equities underlying the claim and counterclaim.

It is respectfully submitted in conclusion that the principles of fairness and justice which were announced in *The Thekla* need no further exposition and that the instant determination of amount does not offend the early decisions of this court upon which the Government relies. It is accordingly submitted that the petition for writ of certiorari should not be granted.

Respectfully submitted,

SHIRLEY STEWART,
EUGENE F. BLACK,
HOWELL VAN AUKEN,
Counsel for Respondent.

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CHARLES ELMORE CROPLEY

In The

Supreme Court of the United States

October Term, 1939.

No. 570.

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN C. SHAW, Administrator De Bonis Non of the Estate of Sydney C. McLouth, Deceased,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Michigan.

BRIEF FOR RESPONDENT.

SHIRLEY STEWART,
EUGENE F. BLACK,
HOWELL VAN AUKEN,
Counsel for Respondent.

NATIONAL LAW PRINTING CORPORATION, 4423-29 Field Avenue, Detroit, Michigan
PLaza 7117

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In The

Supreme Court of the United States

October Term, 1939.

No. 570.

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN C. SHAW, Administrator De Bonis Non of the Estate of Sydney C. McLouth, Deceased,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Michigan.

BRIEF FOR RESPONDENT.[1]

OPINION BELOW.

The opinion of the Supreme Court of Michigan is officially reported in *Volume 290 of Michigan Reports, at page 311.*

1. Excepting where the context clearly indicates otherwise, all italics herein are those of undersigned counsel.

JURISDICTION.

Jurisdiction is invoked under Section 237 (b) of the Judicial Code on allegation that the decision below denied an immunity claimed by petitioner under the Constitution and Statutes of the United States.

QUESTION PRESENTED.

It is respectfully suggested that petitioner's statement of presented question is inaccurate and that the true question is:

Where the United States voluntarily presents and prosecutes, to final judicial determination in a state Probate Court, a meritorious claim against an estate which originally accrued to the Emergency Fleet Corporation and passed to the United States by assignment, and where a set-off against such claim consisting of a counter cause of action against the Fleet Corporation is duly asserted and ultimately upheld on the merits by a final judgment of the highest court of such state, does such Probate Court, considering the *pendente lite* assumption by the United States of the Fleet Corporation's obligations by the Act of June 29, 1936, possess jurisdiction on remand to enter an order in accordance with the local statutory practice by which the excess of the adjudicated set-off over and above the claim as presented is "ascertained and allowed"?

STATEMENT OF THE CASE.

Petitioner's Statement of the Case omits the following material facts:

The merits of the instant set-off were adjudicated and placed at rest by judgment of the Michigan Supreme Court on *former appeal (In re McLouth's Estate, 281 Mich. 191)*. That decision was rendered in 1937, and no review was ever sought in the present court.

So that this court may readily comprehend the various proceedings which were taken in the Michigan courts and the consequent finality of such judgment, we respectfully submit the following outline taken chronologically from the reported cases:

In May of 1920 U. S. Shipping Board Emergency Fleet Corporation, designated in the contract as "acting for and on behalf of the United States," undertook with McLouth to assume and pay his certain debt to Ingram-Day Lumber Company. See both opinions of Michigan Supreme Court—*281 Mich. 191; 290 Mich. 311.* The debt not being paid, Ingram-Day Lumber Company sued McLouth. The Fleet Corporation and its own staff of attorneys took complete charge of McLouth's defense, but were unsuccessful, and judgment against McLouth's administrator in the sum of $42,789.96 was ultimately recovered. *(Ingram-Day Lumber Company v. McLouth, 275 U. S. 471.)* This judgment was thereafter duly allowed (by the Michigan Probate Court holding jurisdiction over McLouth's estate) as a proper claim of Ingram-Day Lumber Company against McLouth's Es-

tate in the sum of $58,089.04, including interest and costs (R. 14, 15).

Supplemental contractual dealings between McLouth and the Fleet Corporation, concerning the same general matters, resulted in accrual to the Fleet Corporation of a cause of action against McLouth. The cause of action passed to the United States by the assignment of 1923 *(United States ex rel. Skinner and Eddy v. McCarl, 275 U. S. 1; In re McLouth's Estate, 281 Mich. at page 196)* and, in 1933, the United States recovered judgment thereon against McLouth's administrator in the sum of $40,165.40 (Affirmed on appeal—*Shaw v. United States, 75 Fed. (2) 175).* This judgment was also made the basis of a claim which was duly presented by the Government against McLouth's estate with statutory petition to such probate court for allowance thereof.[1] In accordance with local statutory practice the administrator exhibited and proved, in offset, the Ingram-Day claim and the Fleet Corporation's covenant to assume and pay same. On first hearing the Probate Court (acting by local statute as Commissioner on Claims) allowed the Government's claim and disallowed the set-off. On appeal to the Circuit Court of Michigan (an appellate court in probate cases),[2]

1. The judgment obtained by the Government in federal court against McLouth's administrator was not received as conclusive evidence of the Government's claim against the estate. Because the Government, in prosecuting the suit in federal court, failed to observe the local practice respecting notice to creditors of an insolvent estate, the federal court judgment was held by the circuit court on former appeal as having no probative force as against the appellant creditors. See appendix for complete copy of circuit court opinion on such former appeal. Government counsel finally conceded that the judgment was not conclusive as against such creditors. See recorded concession in *281 Mich. 199.*

2. See collection of cases in opinion of Michigan Supreme Court (R. 74).

the Probate Court's order was reversed and the set-off was upheld. On appeal to the Supreme Court of Michigan, the Circuit Court's judgment was affirmed *(281 Mich. 191)* and the case was remanded to the Probate Court with instructions.

One question only was left open for decision by the Probate Court on such remand (R. 14, 43). That question was: should statutory "ascertainment and allowance" be made of the excess of the adjudicated set-off over the claim as presented? (R. 42). Such question was resolved in favor of the estate by order of the Probate Court "ascertaining and allowing" the excess owing by the United States at the sum of $23,628.97 (R. 16), and the order was duly affirmed on appeal by the Supreme Court of Michigan. The latter court's judgment of affirmance is the decision which this court, on the instant application for writ of certiorari, has consented to review (Cert. Gr. Jan. 8, 1940).

SUMMARY OF ARGUMENT.[2]

POINT A.

The Probate Court's order is a judicial ascertainment or determination of amount owing by the United States and does not constitute a money judgment against the United States.

POINT B.

The Probate Court's order, whether it be termed a judgment or judicial determination of amount, is eminently proper under the decisions of this court.

POINT C.

Immunity from affirmative judgment or judicial ascertainment in this case, if any, was waived when the United States, having already taken a general assignment of assets and receivables from the Fleet Corporation, dissolved the latter and assumed its obligations by the Act of June 29, 1936.

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2. Since this brief will have been prepared before service of printed copies of the petitioner's brief, all pertinent references herein are to the typewritten advance copy of petitioner's brief forwarded us by the Solicitor General on January 19, 1940. It is assumed that page numbers of the printed copy will conform to the typewritten copy.

ARGUMENT.

POINT A.

The Probate Court's order is a judicial acertainment or determination of amount owing by the United States and does not constitute a money judgment against the United States.

The Solicitor General alleges that the Michigan Supreme Court has decided the question to be reviewed in a way not in accord with *United States v. Eckford, 6 Wall. (73 U. S.) 487.* Preliminarily, therefore, we take the following excerpt from the *Eckford case:*

> "Without extending the argument, we adopt the views expressed by this court in the case of *De Groot v. United States,* decided at the last term, that when the United States is plaintiff and the defendant has pleaded a set-off, which the Acts of Congress have authorized him to do, no *judgment* can be rendered against the Government, *although it may be judicially ascertained that, on striking a balance of just demands, the Government is indebted to the defendant in an ascertained amount.*"

The Solicitor General offers no argument to the point that a money judgment, as distinguished from a judicial determination or ascertainment of amount owing, was entered by the Probate Judge and approved by the Michigan Supreme Court. Indeed, he apparently concedes that the Probate Judge's order is not a money judgment because, in brief on the merits, he repeatedly declares that it makes no difference whether the order of the Probate Court be denominated a "judgment" or a "judicial ascertainment" in view of the fact that it "con-

stitutes a *final determination* of the liability of the United States" (Br. pp. 5, 8, 12).

If, by such argument, the Solicitor General intends to concede that the Probate Court's order is not a money judgment as distinguished from a final ascertainment or determination of amount owing by the United States, then the present issue is greatly simplified. We are certainly ready to concede that the order "constitutes a final (though legally unenforcible) determination of the liability of the United States." The respondent has never claimed otherwise and the efforts of his counsel have been continuously devoted to the proposition that the Probate Judge, in making a final judicial ascertainment or determination of the balance owing by the United States, did not and could not enter a money judgment.

It is submitted that the position of Government counsel in this regard is most incongruous and contradictory. They apparently lean heavily on the *Eckford case* and yet attempt to reject its plainly declared approval of jurisdiction, in a *judicial* proceeding voluntarily instituted by the Government, to make final *judicial* ascertainment (short of a money judgment therefor) of a balance owing by the United States. The contention overlooks this court's declaration that Governmental indebtedness may be *judicially* ascertained in such a proceeding, and it prompts the question: If the permitted "judicial ascertainment" of Governmental indebtedness in given case was not intended by this court to be a final, though unenforcible, determination of the liability of the United States, what was it intended to be? This court was certainly not dealing out bootless procedural advice and the answer, as we read the *Eckford case*, is not difficult of divination. The sovereign dignity was thereby protected from the command of the usual money judgment which is enforcible by execution, and final judicial determination of amount

owing by either party was still permitted in the interest of complete and final adjudication. See for confirmation of this view *The Gloria, 286 Fed. 188.*

As evidence that the Probate Judge did not and could not enter a money judgment as distinguished from a judicial determination of amount owing, we respectfully present the following review of the powers and jurisdiction of such Probate Court and of the Probate Judge when he acts by statute as Commissioner on Claims.

(a) The powers and jurisdiction of the Probate Court as distinguished from those of Commissioners on Claims.

The general powers and jurisdiction of the court are defined and declared by Sections 15519 and 15520 of the Michigan Compiled Laws of 1929 (Mich. Stat. Ann. 27.2619; 27.2620),[1] and we quote same in full as follows:

> "Each judge of probate shall have jurisdiction:
> 1. Of all matters relating to the settlement of the estates of all deceased persons, whether testate or intestate, who were at the time of their decease inhabitants of, or residents in his county, and of all who shall die without the state leaving any estate within such county to be administered;
> 2. Of trusts and trustees in the execution of wills and administration of estates of deceased persons;
> 3. To appoint guardians to minors and others in the cases prescribed by law, and of the settlement of the estates of such minors and others under guardianship;

1. After the instant case was decided by the Michigan Supreme Court (Sept. 5, 1939), important amendments of these sections became effective. For reasons to be presently stated, we do not believe these amendments are material here.

4. Of all cases of juvenile delinquents and dependents;

5. And shall have and exercise all such other powers and jurisdiction as are or may be conferred by law;

6. And to that end he may, upon the filing in said court of a petition therein, within ninety (90) days of the original hearing, or of the rendering or making of any order, sentence or decree, as the case may be, and after due notice to all parties interested, grant rehearings, and may modify and set aside orders, sentences and decrees rendered in such court: Provided, however, That the jurisdiction conferred by this section shall not be construed to deprive the circuit court in chancery in the proper county of concurrent jurisdiction as originally exercised over the same matter."

"Each judge of probate shall have power:

1. To administer all oaths necessary in the transaction of business before the probate court, and all oaths required by law to be administered to persons executing trusts under the appointment of such court;

2. To issue all warrants and processes in conformity to the rules of law, which may be necessary to compel the attendance of witnesses residing in any part of this state, or to carry into effect any order, sentence or decree of the probate courts, or the powers granted them by law, and to issue warrants directed to any sheriff, constable or other proper officer in this state, requiring him to apprehend and imprison any person who shall refuse or neglect to perform any order, sentence or decree of a probate court, requiring such officer to apprehend and imprison such person in the common jail of the county, until he shall perform such orders, sentence or decree, or be delivered by due course of law; and all such officers shall serve and execute all legal warrants and processes to them directed by any judge of probate;

3. To keep order in his court, and to punish any

contempt of his authority, in like manner as such contempt may be punished in the circuit court;

4. And shall have such other powers as may be conferred by law."

It is noted that no power to enter judgments, money or otherwise, is conferred, and that no power to issue executions is granted. We represent that the adjudicating power and jurisdiction of the Probate Court is limited to *orders, sentences and decrees;* that proceedings in such court are essentially *in rem* and are not *inter partes,* and that the powers of the court are purely statutory

In *Holbrook v. Cook, 5 Mich. 225,* it was relevantly declared:

"It is true probate courts are 'courts of record,' being declared to be such by the constitution, but they are not 'courts of law,' according to the ordinary use of the term. They derive their origin and jurisdiction from a source altogether distinct from the common law, and they exercise no functions peculiar to that system. Parties cannot litigate questions of fact in them, except in the instance of probate of wills, or when the power of appointment is to be exercised; and then no issues are joined by pleadings, no juries are known, *and they render no judgments—their determinations being called orders, sentences or decrees*—and upon summary inquiry, with or without notice, as the case may be."

In a recent case *(In re Quinney's Estate, 287 Mich. 335)* the Michigan Supreme Court made exhaustive collection of the authorities which support our representation that, because no statute grants the power, the Probate Court is without jurisdiction to render money judgments. On the strength of eighteen cases which were cited or quoted from, the court reaffirmed the following:

"The probate court derives none of its jurisdiction

or power from the *common law, Grady v. Hughes, 64 Mich. 540,* but must find the warrant for all its doings in the statute."

In *Smith v. Shawhan, 37 Iowa 533,* the distinction between a judgment and a probate court order of allowance was clearly stated in the following language:

> *"One of the necessary incidents of every judgment is its means of enforcement by execution. An order of the county court allowing a claim against an estate and ordering the payment of such claim cannot be thus enforced. The county court has no power to issue execution upon such an order. We are of opinion that the filing and allowance of the plaintiff's claim in the county court did not constitute a 'judgment,'* in the sense in which that term is used in the clause of the statute of limitations which we have been considering, and consequently that the claim of the plaintiff is not barred as a judgment of a court not of record."

On the foregoing authorities we respectfully submit that the Probate Court could not have entered a money judgment against any party or person before it. The statutory limitation of its powers, and the very wording of the particular statute under which it assumed to act, clearly show that a judicial ascertainment of amount is all that could have been or was done. The statute in question provides:

> "When a creditor against whom the deceased had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be."

Compiled Laws Michigan, 1929, Section 15682 (Mich. Stat. Ann. 27.2829).[2]

We take note here of the Solicitor General's contention that Act 288, Mich. P. A. 1939, known as the "new Probate Code" (1939 Supp. Mich. Stat. Ann. 27.3178), which became effective twenty-one months *after* the presently criticized determination of the Probate Court was made—likewise *after* entry of the Michigan Supreme Court's judgment under review—, is authority for contention that the instant determination of amount would be enforcible by execution if the claimant had been a private one.

This new legislation, for the first time as we have seen, granted the Probate Court power "*to issue all executions* * * * which may be necessary to compel the attendance of witnesses residing in any part of the state, or to carry into effect any order, sentence, or decree of the Probate Courts, or the powers granted them by law" (Sec. 20, Chap. I). Further on in the same section, and to give procedural life to the new power, the legislature provided for the first time: "service and enforcement of the executions mentioned in this chapter and the return thereof shall be had in accordance with the law applicable in courts of record."

Aside from fundamental rule that a question of jurisdiction is determinable by the law in force at the

2. By another statute dealt with hereinafter (Compiled Laws, Michigan, 1929, Section 15681; Mich. Stat. Ann. 27.2828) the probate judge may, in his discretion, act in the place and stead of commissioners on claims. He did so throughout the proceedings which were instituted by the Government in the present case (R. 9, 15, 17).

time such jurisdiction is judicially asserted, we represent that said Act 288 declares its own inapplicability to this issue.[3] The final section of the act provides (Sec. 5, Chap. XIII):

> "This act shall not impair or affect any act done, offense committed or right accruing, accrued, or acquired, or liability, penalty, forfeiture or punishment incurred *prior to the time this act takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if this act had not been passed.*"

The fact that power to issue and levy execution was expressly granted to the Probate Court by said Act 288 is cumulative evidence, especially when such new legislation is considered with the authorities hereinbefore cited, that the power did not theretofore exist. However, and entirely aside from such consideration, we submit that the Solicitor General has lost sight of a local distinction of fundamental nature. We refer to the essential difference between the Probate Court itself and Commissioners on Claims, and we note here that the Probate Judge, throughout the proceedings under review, acted in pursuance of statute in the place and stead of Commissioners on Claims (R. 9, 15).[3]

(b) The powers and jurisdiction of Commissioners on Claims and of the Probate Judge when he acts in their place and stead.

When a Michigan Probate Judge assumes to act in accordance with statute permitting him to act as Com-

3. This fact has been admitted and declared in every pleading filed by the Government (R. 6, 7, 17, 18, 21, 22, 23, 27, 28, 29).

missioner on Claims (C. L. Mich. 1929, Sec. 15681; Mich. Stat. Ann. 27.2828), *his powers and duties are entirely distinct and separate from the general statutory powers of the probate Court and they are governed by special statutory and equitable rules.* Accordingly, even if the legislature had granted, *to the Probate Court,* general power to enter money judgments, a judicial determination by the Probate Judge, acting as Commissioner on Claims, would still not constitute a judgment or anything beyond the statutory and equitable powers of Commissioners on Claims.[4]

We pertinently quote from a recent case, *In re Brown's Estate, 280 Mich. 178,* as follows:

> "The statute, 3 Comp. Laws 1929, § 15681, provides when and how the judge of probate may sit to hear claims and says:
>
> 'The action of the judge of probate in passing upon and adjusting claims shall have the same effect upon all claims against the estate as the action of commissioners would have had if com-

4. It is of interest that Probate Commissioners on Claims have been abolished by the 1939 Michigan Probate Code (effective September 29, 1939) and the practice on submission and determination of claims and counterclaims has been radically changed (Sec. 3, Chap. VIII, Act 288, Mich. P. A. 1939; 1939 Supp. Mich. Stat. Ann. 27.3178—413). The set-off statute, in pursuance of which the instant determination of balance owing was made, now reads as follows (new wording italicized):

> "When a creditor against whom the *decedent or ward* had claims shall present a claim *against the estate, the fiduciary may file the claim of the decedent or ward* in offset *thereto* and *the court* shall ascertain and allow the balance against or in favor of the estate as *he* shall find the same to be." *(Sec. 9, Chap. VIII, Act 288, Mich. P. A. 1939; 1939 Supp. Mich. Stat. Ann. 27.3178—419.)*

missioners had been appointed and had acted according to law, and subject to the same provisions in reference to appeal.'

In *Lothrop v. Conely, 39 Mich. 757,* it was said:

"The commissioners when once appointed become a special tribunal which for most purposes is independent of the probate court, and from which an appeal lies to the circuit court."

In *Clark v. Davis, 32 Mich. 156,* the Michigan Supreme Court, speaking through Mr. Justice Cooley, said:

"The general idea of our statute,—Comp. L. 1871, Chap. 158, is that all claims against the estates of deceased persons shall be duly proved before commissioners appointed to hear them, or before the probate court when no commissioners are appointed. The commissioners act judicially in the allowance of claims, and the administrator cannot bind the estate by admitting their correctness, but must leave them to be proved in the usual mode: *Fish v. Morse, 8 Mich. 34.* Where commissioners are appointed, as was the case here, the probate court has no authority over the claims, and parties thinking themselves aggrieved appeal, not to that court, but to the circuit court. —Comp. L. § 4439."

In *Flynn v. Lorimer's Estate, 141 Mich. 710,* it was stated:

"They (the Commissioners) were acting in a judicial capacity, and their action is final when not appealed from. *Shurbun v. Hooper, 40 Mich. 503; People ex rel. Green v. McCutcheon, 46 Mich. 244; Byrne v. Hume, 86 Mich. 546; Finley v. Dubay, 112 Mich. 334.* The claim presented to them was such a claim as they were authorized to try and decide.

They did try and decide it. We think the effect of that decision is final."

In *Chapoton v. Prentis, 144 Mich. 292,* it was said:

"The allowance of the claims by the Commissioners on claims, who had jurisdiction to pass upon them, in the absence of fraud, was conclusive against the estate and all persons who had an opportunity to be heard."

The set-off statute (quoted hereinbefore, page 12), in pursuance of which the instant judicial ascertainment was made, was construed in *Willard v. Fralick, 31 Mich. 431,* as follows:

"The power of commissioners (on claims) is peculiar and very broad, and we think the language of this section should not be narrowed beyond its terms, and should allow a proper set-off in all cases."

and in *Green v. Probate Judge, 40 Mich. 246,* as follows:

"The statute evidently contemplates that in all cases where it is practicable, the representative of the estate shall exhibit such claims of set-off as exist against the demand of a creditor, so that the *final determination* shall show the balance due either party after deducting one claim from the other. Comp. L., § 4428. This is not intended to be left to the discretion of the executor or administrator; and while we are not required to determine the effect of such omission in all cases, we have no doubt the law was passed to secure this action in cases where there is no reason to the contrary. It is essential to the interests of creditors and distributees that the estate shall be closed as quickly and cheaply as possible, and that the amount of assets shall be early liqui-

dated and collected. If the estate may avoid putting in set-offs, the creditor who is at the same time a debtor may also prefer to have his own claim passed on in a suit at law, and thus greatly postpone a settlement."

In *Graham v. Graham, 171 Mich. 310,* it was said of the same statute:

"There is no doubt that the statute contemplates that wherever it is practicable, or unless there is reason to the contrary, the representative of an estate will set off claims of the estate against those of the creditor, so that a final balance may be ascertained by the parties and needless litigation avoided."

The Michigan statute under discussion is common to several states. See *24 C. J. 378,* where it is said:

"Set-Off. The statutes usually provide that, where a creditor presents a claim to the commissioners, or to the court of probate, the personal representative may exhibit claims of the deceased as a set-off to the claim of the creditor, and the commissioners or the court shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be."

Attention is respectfully directed to a most striking similarity of language and phraseology. The *Eckford case* permits "judicial *ascertainment* that, *on striking a balance of just demands,* the Government is indebted to the defendant in an ascertained amount." The Michigan statute directs that the commissioners on claims (or court acting in their stead as the case may be) "shall *ascertain* and allow *the balance against or in favor of the estate as they shall find the same to be.*" Power to

direct or command payment of the ascertained amount, and power to issue execution therefor, are negatived in both instances and, as will be seen from authorities cited above, such powers cannot be implied into the Michigan statutes.

Under the statute a Probate Judge may either hear and determine claims and counterclaims or he may appoint Commissioners on Claims for such purpose *(C. L. Mich. 1929, § 15674; Mich. Stat. Ann. 27.2821)*. If he elects to hear and determine such claims and counterclaims himself, as he did in the present case, the proceedings and determinations are, in law, those of Commissioners *(C. L. Mich. 1929, § 15681; Mich. Stat. Ann. 27.2828)* and they are reviewable in the Circuit Court, not by the statutory practice on appeals from *Probate Court* but by the statutory practice on appeals from decisions of *Commissioners on Claims (McAllen v. Lipson's Estate, 258 Mich. 15)*. The Government actually recognized this rule when it took appeal in the present case from the decision of the Probate Judge, acting as Commissioner on Claims (R. 17).

Acting as such Commissioner the Probate Judge had relevant powers and duties provided by the following statutes:

> "At the expiration of the time limited, or as soon thereafter as they shall have time to complete the hearing of the claims presented, *the commissioners shall make a report of their doings to the probate court, embracing lists of the claims presented, or exhibited in off-set, and stating how much was allowed, and how much disallowed, together with the final balance, whether in favor of the creditor or the estate;* and the report shall state particularly the manner of giving notice to the claimants. Said

commissioners shall also send a copy of their findings in all contested claims to all the parties of interest therein at the time of the filing of their report." *(C. L. Mich. 1929, Sec. 15684; Mich. Stat. Ann. 27.2831.)*

"*The commissioners shall have power to try and decide upon all claims which by law survive against or in favor of executors and administrators,* except claims for the possession or title of real estate; *and may examine and allow all demands,* at their then present value, which may be payable at a future day, including claims payable in specific articles, *and may offset such demands in the same manner in favor of the estate.*" *(C. L. Mich. 1929, Sec. 15685; Mich. Stat. Ann. 27.2832.)*

The Probate Court, as distinguished from Commissioners on Claims, has no control or supervision whatever over the doings and decisions of Commissioners on Claims. The decisions of the latter, in the shape of a report or succession of reports, are final determinations of a judicial tribunal *(Clark v. Davis, supra; Flynn v. Lorimer, supra; Chapoton v. Prentis, supra; Shurbun v. Hooper, 40 Mich. 503).* Appeal from their decisions lies, not to the Probate Court but to the Circuit Court *(Clark v. Davis, supra).* Consequently, even if general power had been given *the Probate Court* to enter money judgments and issue executions (which as we have seen was not given), the present determination of the Probate Judge, acting as Commissioner on Claims, would still not constitute a money judgment as distinguished from a final ascertainment and decision of a specially constituted judicial tribunal. Any doubt on this score is removed by the following cases:

In *McKinney v. Curtis, 60 Mich. 611,* it was forcefully held:

"As to the ground that the case before this Court

heretofore is a bar, it only need be said that *in no sense is a proceeding to have a claim allowed before commissioners, and the decision given by them, a common-law judgment.*"

In *LaRoe v. Freeland, 8 Mich. 530* (followed on this point in *Tyler v. Gallop's Estate, 68 Mich. 187*), the question under discussion was raised and settled by the court *sua sponte*. It was there said:

> "We take occasion to suggest that, under our statutes, the more correct form of judgment in the Circuit Court on Appeal from the allowance of a claim, *would be an adjudication of the allowance of the claim at a certain sum, or a disallowance, and not a judgment against the administrator in the common law form. The statute regards the action of the court as analogous to that of the commissioners:* Comp. L., p. 891, § 2941. *A formal judgment may not be erroneous in law, but is liable to misapprehension, inasmuch as it cannot be literally enforced according to its terms.*"

In *Johnson v. Powers, 139 U. S. 158*, which was an appeal from the Northern District of New York involving outstate effect of proceedings in a Michigan Probate Court, the foregoing rule of *LaRoe v. Freeland* was incorporated in the opinion as follows:

> "The decision of the commissioners (on claims), or of the Circuit Court on Appeal, should properly be only an allowance or disallowance of the claim, and not in the form of a judgment at common law. *LaRoe v. Freeland, 8 Mich. 530.*"

In harmony with these cases, the instant determination of amount owing by the United States includes no features of a money or common-law judgment and it is

confined to judicial determination of the Government's ascertained indebtedness. After adjudicating a disallowance of the Government's claim as presented the Probate Judge's order reads:

> "It is further ordered, adjudged and ascertained, in accordance with Section 15682 of the Compiled Laws of the State of Michigan, that United States of America is indebted to said estate in the sum of $23,628.97 as of December 8, 1937, and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate by the United States of America."

To recapitulate: We respectfully declare that special statutes govern the powers and proceedings of Commissioners on Claims *(C. L. Mich. 1929, Sec. 15674, et seq.; Mich. Stat. Ann. 27.2821, et seq.)*; that special statutes govern appeals to the Circuit Court from determinations of the Commissioners as distinguished from the orders and decrees of the Probate Court *(McAllen v. Lipsons' Estate, 258 Mich. 15)*; that the statutory provision for rehearing, within ninety days, of orders and decrees of the Probate Court (quoted on preceding page 10 of this brief), has no application to decisions and determinations of Commissioners on Claims *(In re Brown's Estate, 280 Mich. 179)*; that the Commissioners (and the Probate Judge when he acts in their place and stead) constitute a special statutory tribunal and are governed by equitable principles in determination of claims against and in favor of the estate *(Foote v. Foote, 61 Mich. 192)*; that they act judicially and their determinations are final in the absence of appeal *(Flynn v. Lorimer's Estate, supra; Chapoton v. Prentis, supra)*, and that they do not and cannot enter judgments *(LaRoe v. Freeland, supra; McKinney v. Curtis, supra)*. Accordingly, since the Probate Judge was acting as a Com-

missioner on Claims when he made the presently criticized judicial determination, we respectfully submit that there can be no reason in assertion that his action constituted anything beyond a final though unenforcible determination or ascertainment of the rights of the Government and the estate in respect to the duly presented claim and counterclaim.

It may be inquired: What is the status of a similar statutory ascertainment of balance as against a private claimant? The answer is that such a determination can be made enforcible only by assumpsit in the Circuit Court, as was done in *Shurhun v. Hooper, 40 Mich. 504*, or by suing out of a writ of *scire facias* in a court competent to render money judgments and issue execution. *Cf. Reeside v. Walker, 11 How. (52 U. S.) 288, 289.* Michigan retains the common law writ of *scire facias* and permits actions in its Circuit Courts thereon. *McRoberts v. Lyon, 79 Mich. 33.*

Again returning to the distinction made by the *Ecklord case*, we respectfully call attention to *United States v. National City Bank, 83 Fed. (2) 236, 106 A. L. R. 1235 (Cert. Den. 299 U. S. 563).* In that case the court of appeals of the second circuit upheld an affirmative ascertainment of amount owing by the Russian Government (the United States was substituted *pendente lite* for the Russian Government as plaintiff and appellant) on determination of claim and counterclaim. We take the following from the affirmed District Court opinion *(4 Fed. Supp. 417)*:

> "The offset must therefore be allowed, and this involves a determination of the amount of it. Injustice to the defendant would be prevented by merely finding that the offset is sufficient to defeat

the plaintiff's recovery, but equity ought not to leave the adjudication incomplete. *There should be a determination of the exact amount due to the National City Bank, without, of course, any direction that the plaintiff pay the excess or that it be subject to a judgment for the excess.*

Settle decree accordingly, but without costs."

Concluding presentation of this point "A," respondent earnestly submits that the distinction made by the *Eckford case* between a judgment on the one hand and a judicial ascertainment or determination of amount on the other, is clear, and that the instant judicial determination qualifies in every respect for accord with such decision. This court obviously intended, when it declared decision in the *Eckford* and *DeGroot cases*, to preserve the sovereign dignity in given case from command of a money judgment collectible by execution and yet, in the interest of complete adjudication and early settlement of dispute, to construe the Act of 1797 as permitting the forum selected by the Government to make judicial ascertainment of amount owing by either party on striking a balance of proper demands.[5]

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5. The instant set-off was duly presented and rejected under Section 951 of the Revised Statutes. See recorded concession of the fact in *281 Mich., at page 198.* Construing said Section 951 the Court of Appeals of the Ninth Circuit said *(United States v. Skinner & Eddy Corp., 35 Fed. 2nd 889)*:

"The Congress of the United States, as early as 1797, granted the right to sue the Government by way of claims for credit, solely as a defense in suits brought by it, *and incidentally to adjudicate the amount of such claims where they had been presented to the accounting officers of the Treasury and by them disallowed in whole or in part.*"

POINT B.

The Probate Court's order, whether it be termed a judgment or judicial determination of amount, was eminently proper under the decisions of this court.

It is submitted that this attack upon the jurisdiction is controlled by *United States v. The Thekla, 266 U. S. 328*, wherein opinion was delivered by Mr. Justice Holmes. In that case the United States voluntarily joined in the suit and thereby subjected itself to the court's general jurisdiction to determine all questions legitimately involved including the merits and amount of a properly asserted counter claim. In present case the United States voluntarily entered a state court holding jurisdiction *in rem* over the *res* of an estate[1] and asserted, in accordance with the local statutory practice, a claim against the *res*. In accordance with the mandatory requirements of the same local practice, a counterclaim was duly asserted and it was thereafter upheld on the merits. We submit that there is no essential difference between the act of joining in suit in the one case and the act of entry into court for assertion of claim in the present case, and that the decision of this court in the *Thekla* is a progressively broad announcement of principle which is

(1) *United States v. Bank of New York and Trust Company, 296 U. S. 463, 477, 478, 479; Allison v. Smith, 16 Mich. 405; People ex rel. Fraser v. Wayne Circuit Judge, 39 Mich. 198; Mower's Appeal, 48 Mich. 441; Stevens v. Hope, 52 Mich. 65; Mich. Miss. Society v. Corning, 164 Mich. 396; In Re Brown's Estate, 198 Mich. 563; In Re Meredith's Estate, 275 Mich. 295; Montgomery v. Wayne Circuit Judge, 284 Mich. 430.*

equally applicable to proceedings instituted by the Government in modern courts of law, equity and admiralty. This court said:

> "When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where, but for its sovereignty, it would be liable, does not destroy the justice of the claim against it."

> "The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and, on the other hand, the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest. As has been said in other cases, the question of damages to the colliding vessel necessarily arose, and it is reasonable for the court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States. The *Nuestra Señora de Regla (United States v. The Nuestra Señora de Regla), 108 U. S. 92, 27 L. Ed. 662, 2 Sup. Ct. Rep. 287; The Paquete Habana (United States v. Paquete Habana), 189 U. S. 453, 465, 466, 47 L. Ed. 901, 903, 904, 23 Sup. Ct. Rep. 593.* We gather that our conclusion accords with the opinion of the English court. The *Newbattle, L. R. 10 Prob. Div. 33, 54 L. J. Prob., N. S. 16, 52 L. T., N. S. 13, 33 Week. Rep. 318, 5 Asp. Mar. L. Cas. 356; The Tervaete, L. R. (1922) Prob. 259, 272, 91 L. J. Prob., N. S. 213, 38 Times L. R. 825, 67 Sol. Jo. 98, 154 L. T. Jo. 63—C. A. It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act."*

The Government contends, however, that this decision is applicable only to maritime proceedings. In turn we contend that there are a number of annihilating answers to such contention. In the first place, the comprehensive rule of the *Thekla* was quoted and followed in *Am. P. & Mfg. Company v. United States, 300 U. S. 475;* in *United States v. National City Bank, 83 Fed. (2) 236, 106 A. L. R. 1235 (Cert. Den. 299 U. S. 563),* and in *Guaranty Trust Company v. United States, 304 U. S. 126,* no one of which was instituted in a maritime court or involved maritime questions.

In the *American Propeller case* this court, after quoting (from the *Thekla)* its announced rule versus obstruction "of natural justice against the Government by technical formulas when justice can be done without endangering any public interest," said:

> "If the principle thus stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

In the *Guaranty Trust case* a suit was brought by the United States as assignee of the Soviet Government to recover a bank deposit theretofore owned and possessed by the assignor. The defendant pleaded the statute of limitations. Clearly, no maritime question was involved. In the course of its ruling that the pleaded defense was good as against alleged Governmental immunity therefrom, this court said:

> "By voluntarily appearing in the role of suitor it (the Soviet Government) abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in

suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. *United States v. The Thekla, 266 U. S. 328, 340, 341, 69 L. Ed. 313, 315, 316, 45 S. Ct. 112; United States v. Stinston, 197 U. S. 200, 205, 49 L. Ed. 724, 725, 25 S. Ct. 426; The Davis (United States v. Douglas), 10 Wall. 15, 19 L. Ed. 875; The Siren, 7 Wall. 152, 159, 19 L. Ed. 129, 132.*"

In the second place, the Government's present contention was thoroughly discredited by reasoned thesis of Judge Mack in the very case (*The Gloria, 286 Fed. 188*) which this court affirmed by the Thekla decision. We quote from Judge Mack's ably considered opinion as follows (page 200 of report):

> "*The Nuestra Senora de Regla, 108 U. S. 92, 2 Sup. Ct. 287, 27 L. Ed. 662,* and *The Paquete Habana, 189 U. S. 453, 23 Sup. Ct. 593, 47 L. Ed. 900,* mark a considerable advance in the view of the court. Both of these were prize cases; both were cases of wrongful seizure by the Government. And in both cases the court rendered on the counterclaim filed an affirmative decree in favor of the claimant and against the Government as libelant. *It may be possible to urge that a peculiar rule obtains in prize cases, but it is difficult to say that the court based its decisions on any such narrow ground.* Indeed, in *The Paquete Habana,* counsel for the claimant, apparently fearing that the court might draw back from the broad ground taken in *The Nuestra Senora de Regla,* argued that the claim of the owner of the vessel seized was simply for restitution of the property or its cash equivalent. *The court did not, however, adopt any restricted theory of this kind. It placed its decisions on the broad principle of modern law that, the Government having come into the court, the court would determine all questions necessary for the disposition of the entire controversy.* That being the case, the court properly embodied

its determinations in the form of a decree. *It distinguished,* what it had failed to distinguish in the earlier cases, *the rendering of an affirmative judgment or decree from its enforcement or execution.*"

The following decisions support Judge Mack's view that the doctrine here invoked by respondent applies equally to law, equity and admiralty proceedings:

"When a sovereign voluntarily appears in our court, it assumes the character of a private suitor. *The Thekla, 266 U. S. 328.*" *Dexter and Carpenter v. Kunglig, etc., 43 Fed. (2) 708 (C. C. A. 2).* (This was a common law action.)

"To protect its property the United States has all the rights of persons, may sue in the state courts or in its own tribunals, and of course is concluded by the decree rendered even as persons are." (Citing *The Thekla.*) *United States v. American Ditch Association, 2 Fed. Supp. 868 (D. C. Idaho).*

"With all due regard for the powers and attributes of sovereignty, it is well to remember that, when a sovereign comes into a court of equity seeking its aid to enforce its rights, *even as the owner of the public domain* (italics by court), its claim should be tested by the same equitable principles which govern suits between private litigants, unless there be a special statute commanding a contrary rule." (Quoting in support, from the *American Propeller case, the Thekla* rule.) *United States v. Standard Oil Company of California, 21 Fed. (2) 655 (D. C. Cal.)*

"There is nothing to limit the broad principles of the *Thekla* to admiralty cases only." *The Barbara Cates, 17 Fed. Supp. 244 (D. C. Pa.).*

"The United States, having presented its claim against the bankrupt estate and having litigated the

claim before the court of competent jurisdiction, was bound by the court's judgment as any ordinary litigant would be, and this court may not exercise jurisdiction to review such final judgment except in accordance with the statutes" (citing the *Thekla*). *United States v. East, 80 Fed. (2) 134 (C. C. A. 8).*

"There is no distinction between an admiralty case and one at law when we come to consider the principle above announced by the Supreme Court." (Referring to the *Thekla.*) *United States v. Moscow-Idaho Seed Co., 14 Fed. Supp. (D. C. Idaho) 135.*

"When all is considered, we are brought to the conclusion that the United States, by its intervention and participation in the suit, consented, impliedly at least, that reasonable allowances be made from the fund, under the rule before stated, for the services and expenses of the next friend and his attorneys" (citing the *Thekla* and the *Siren, 7 Wall. 152).* (This was a suit in equity and not a maritime proceeding.) *United States v. Equitable Trust Co., 283 U. S. 745.*

The only case we have been able to find, which tends to uphold contention that the *Thekla* applies solely to maritime proceedings, is *Danforth v. United States, 102 Fed. (2) 5.* That case was reversed in part and affirmed in part *(Danforth v. United States,* decided December 4, 1939, No. 309). While this court did not find it necessary to rely upon the *Thekla* or the doctrine thereof, it pertinently reversed the ruling of the Court of Appeals that a contract between the Government and the petitioner could not be made effective, as a determination of value, in a condemnation proceeding instituted by the United States.

Lastly, we maintain that the opinion of this court in the *Thekla* contains one feature which, aside from its

broad and comprehensive language, conclusively denies intent that the declared doctrine be confined to proceedings in admiralty. We refer to the passage (*266 U. S., at page 340*):

> "The libel in such a case is like a bill for an account, which imports an offer to pay the balance if it should turn out against the party bringing the bill. *Colombian Government v. Rothschild, 1 Sim. 94, 103, 57 Eng. Reprint 514, 5 L. J. Ch. 43, 27 Revised Rep. 171; Goldthwait v. Day, 149 Mass. 185, 187, 21 N. E. 359.*"

This court will find, and we refer to our hereinafter argued "Point C" for relevant facts, that the instant claim and counter claim arose out of similar and connected undertakings which were mutually agreed upon by and between McLouth and the Fleet Corporation. Furthermore, proceedings in a Michigan Probate Court toward adjustment of claim and counter claim, viewing them as equitable in nature as they should be viewed (*Foote v. Foote, 61 Mich. 192*), actually constitute an equitable accounting and adjustment of mutual credits.

Goldthwait v. Day, which was cited by this court in support of the last quoted passage, is a case wherein the opinion was delivered by Mr. Justice Holmes as a member of the Massachusetts Supreme Court. It was there said:

> "A mutual account exists by agreement, and the effect of it is that the cross-items extinguish each other *pro tanto* at once as they accrue. The only claim of either party is to the balance. See *Tyler v. Boyce, 135 Mass. 558, 561; Fanning v. Chadwick, 3 Pick. 420; In re Steamer Company, L. R. 6 Ch. 822, 830; Grove v. Dubois, 1 Term R. 112, 115, 116; Tompkins v. Willshear, 5 Taunt. 431, 432, and note*

(a); Farrington v. Lee, 2 Mod. 311, 312, 1 Mod. 268, 269. When a bill is brought upon such an account it implies that there are items on both sides, and that the balance is uncertain until ascertained by aid of the court. It seeks to have the balance ascertained and paid, and as a condition of being entertained it imports an offer, which formerly it was required to express, on the part of the plaintiff, to pay the balance if it should turn out against him. *Colombian Government v. Rothschild, 1 Sim. 94, 103; Clarke v. Tipping, 4 Be. v. 588.*"

On the subject "Accounts and Accounting," *Goldthwait v. Day* is cited in support of the text in *1 C. J. 630*, which we quote as follows:

"*Independence of Defendant's Claim; Decree for Balance Due Defendant.* Defendant's claim is not an independent one, but is admitted and asserted by plaintiff so far as defendant can prove his items, and provided they exceed those on plaintiff's side, because the court, having acquired jurisdiction of the cause, will dispose of the entire matter and decree for one or other of the parties as the account may stand."

In *1 C. J. S., 671*, the foregoing text of *Corpus Juris* is reaffirmed in the following language:

"An offer to do equity, by averring plaintiff's willingness to pay any balance that might be found due defendant from him, was formerly a requisite to a bill in equity for an accounting; but it is now the general rule that the mere filing of the bill implies an offer to pay such balance to defendant, without a specific averment to that effect";

and *Goldthwait v. Day* is copiously quoted from in support of the text on subsequent page 674.

Since, for the purposes of the jurisdictional question dealt with and settled in the *Thekla*, a libel in admiralty is like a bill for an account, we respectfully submit that such a libel is even more relevantly analogous to a claim against the *res* of an estate in charge of a court which is asked to allow the claim. In each case the proceeding is substantially *in rem*. In each case the claimant, if his cause be meritorious, is possessed of a lien which the forum is jurisdictionally authorized to adjudicate (for declaration of this rule as applicable to Michigan probate courts, see *Lafferty v. People's Savings Bank, 76 Mich. 46)*. In the maritime court the judicial duty is to proceed to "determination of all the questions legitimately involved, even when it results in a judgment against the United States." In the Probate Court, on presentment of claim against an estate, it is the commanded duty of the representative to exhibit all counter claims and of the Court or Commissioners to ascertain and allow the balance against or in favor of the estate. Presumptively, a person or sovereign filing claim with such a Court knows the statutory powers, duties and functions of the forum selected and of the representatives of the estate libeled. The claimant, regardless of station, is charged with knowledge that the Court or Commissioners cannot jurisdictionally consider his claim without ascertaining the amount of a meritorious offset. If, as in the present case, his claim is based on contractual undertakings which he knows have resulted in counter credits of certain or uncertain amount,[2] is it not reasonable that the voluntary filing of his claim against the *res*, like the

2. The Government has always conceded obligation to McLouth's estate for the item of $647.65, termed "just compensation," which is mentioned and dealt with in *Ingram-Day Lumber Company v. McLouth, 275 U. S. 471.* See pages 61-62 hereinafter (appendix).

filing of a libel or bill for account, be taken as an imported "offer to pay the balance if it should turn out" against him?

Pertinent similarity between a bill for account and an asserted claim in Probate Court is shown by *Foote v. Foote, 61 Mich. 192,* from which we quote:

> "The proceeding authorized by the statute for the purpose of examining, allowing, and adjusting claims against an estate, whether before commissioners or the courts, is an equitable one, and governed by equitable principles; and the administrator of Elisha Foote's estate, in this case, was entitled to avail himself of any equitable, as well as legal, defense which existed against the claim presented for allowance against Elisha's estate."

The Government's entire case fails if its counsel err in assertion that the *Thekla* applies only to maritime cases. On strength of the foregoing presentation we respectfully submit that they do so err, and that the judgment of the Michigan Supreme Court accords in every respect with a now judicially approved rule of beneficence and justice.

We next refer to the extended arguments for Governmental convenience that are contained in the Solicitor General's brief. It is there said, in sum, that any recognition of authority in favor of the state courts to make judicial determination of counterclaims against the Government would be unduly burdensome and it is suggested, for many ably argued reasons, that great public detriment will result if this court does not announce disapproval.

We doubt that present Government counsel, in presenting this argument, have considered or are familiar with the background of facts which this case fronts.

If the Government had chosen to handle this case in accordance with the rules it could, if desirous, have obtained a final determination *in its own courts* of the estate's counterclaim. When it sued the administrator (who was then represented by other counsel) in the United States District Court to recover judgment for McLouth's original indebtedness to the Fleet Corporation, its counsel paid no heed to the established rule that a suit in District Court to establish a claim or right in an estate must be prosecuted in accordance with the local law and that the District Court, in such a case, "is administering the laws of the state of the (decedent's) domicile and is bound by the same rules that govern the local tribunals." *Security Trust Company v. Black River National Bank, 187 U. S. 211; Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33; Pufahl v. Parks, 299 U. S. 217.* Despite the fact that local law gave creditors of an insolvent estate right to notice and hearing in proceedings brought to establish a claim,[3] the creditors of this insolvent estate were given no notice whatever of the District Court suit against the administrator and consequently were not bound by the District Court's judgment. If such creditors had been made parties to the Government's suit in District Court, as should have been done both under local law and by express declaration of this court in

3. (See *Dickinson v. Seaver, 44 Mich. 624,* where the point was squarely decided in favor of persons interested in an estate who had not been made parties to a District Court suit, and statement of applicable local authority contained in the Circuit Court's original opinion in this case—appendix, page 58.)

United States v. Bank of New York and Trust Company, 296 U. S. at page 480, then such creditors would have been obliged to see that a properly asserted counterclaim was presented and proved or suffer adjudicating finality of the District Court's judgment.

The effect of the Government's unfortunate omission, in connection with the District Court suit against the administrator, was this: The judgment in favor of the United States became subject, in the Probate Court, to unfettered defense by the creditors and they, represented in part by undersigned counsel, succeeded in obtaining judicial review and consideration of the estate's counterclaim on the merits. In such connection it is interesting to note that Government counsel finally had to concede that the District Court judgment was ineffective as an adjudication *(281 Mich., at page 199),* and the upshot was that the judgment was ultimately received as evidence only of the Government's claim.

There is thus no room for argument that affirmance of the Michigan Supreme Court's judgment will affect the Government's undoubted right to final adjudication, in its own courts, of rights of action it may there properly present against a decedent's representatives and other interested parties. *Proper* assertion of such a right of action in a District Court suit, against interested parties as defined by local law, results in an adjudication which undoubtedly binds the defendants and the state Probate Court on all questions preceding distribution. *Commonwealth Trust Co. v. Bradford, 297 U. S. 613.*

Returning to the main point under discussion, we proffer for consideration Judge Mack's prophetic review

in the *Gloria, 286 Fed. 188.* The following connected excerpt is taken therefrom:

"As the right of set-off and counterclaim gradually comes to be regarded as affecting the substantive rights of the litigants, one would expect to find courts reluctant to give judgment in favor of a sovereign state, where judgment would, in the circumstances, be denied a private litigant because of the right of set-off or counterclaim. Once the first hurdle is past, and it is recognized that the defendant in suit brought by a sovereign state is not limited in his defense to strict common law recoupment, but may assert the broader right of set-off, *it may be expected that a modern court of equity, of admiralty, or even of law will be impatient of any restrictions on its jurisdiction to determine judicially all questions involved in the controversy or controversies submitted. While a court may have no power to enforce an affirmative judgment against a sovereign state, still if, as a defense to a suit instituted by a sovereign state, a counterclaim or set-off is asserted, it would seem only proper that the court determine all issues fairly before it, even though it involve a finding that the plaintiff state was indebted to the defendant.* A modern court should strive to do complete justice; a partial and incomplete adjudication tends only to protract and complicate litigation to the detriment of all concerned. A partial and incomplete adjudication leaves all parties in grave doubt as to their status and rights, and leads to a multiplicity of suits.

"A sovereign state, generally speaking, is not obliged to go into court; but, if it seeks the assistance of the court, *it would seem to be in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction of the court in respect of any set-off or counterclaim properly assertable as a defense in a similar suit between private litigants.* Although, perhaps, the defendant should not be permitted to assert any counterclaim

which would not be, in whole or part, a defense to the action brought by the state, yet, if it is necessary to examine a counterclaim for the purpose of determining whether there is a defense to the original action, it would seem inconsistent with the duty of a court of general jurisdiction to do complete justice for the court not to determine the whole nature and extent of the counterclaim, even though it involved incidentally a determination that a sovereign state was indebted or obligated to the defendant.

There is no principle of public law exempting a sovereign state from its obligations under the law. It should not be assumed that a state desires to deny or evade its obligations. There may be sound reasons of public policy why a state should be immune from the harassment of litigation in forums and under conditions not agreeable to the state. But, *once the state has chosen its forum, there seems little reason in law or policy why it should not be subject to the substantive requirements of law and justice.*"

As we have seen Judge Mack was duly affirmed by this court in *United States v. The Thekla, 266 U. S. 340.* The wholesome doctrine of the *Thekla* has since aided decision in *United States v. National City Bank, 83 Fed. (2) 236, 106 A. L. R. 1235 (certiorari denied, 299 U. S. 563); American P. and Mfg. Company v. United States, 300 U. S. 476; Guaranty Trust Company v. United States, 304 U. S. 134; United States v. United States Fidelity & Guaranty Company, 106 Fed. (2) 804* (now under review here—No. 569), plus a number of lower court cases, and it is submitted that this rule, now wholly approved, marks completion of a decidedly progressive advancement in judicial thought. During the past twenty years the Government has done a great portion of its work through a constantly increasing number of corporations created by Acts of Congress. The functions of these corporations have spread to and are interlaced in

the lives and business of the farmer, the laborer and the business man. If these corporations are to function expeditiously; if citizens are to be encouraged in dealing with them, the courts should be unhampered in judicial adjustment and determination of their undertakings. As this court noted in *Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 389:*

> "Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of Government in economic affairs have greatly extended the use of independent corporate facilities for Governmental ends. In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such corporations discharging Governmental functions, and without exception the authority to-sue-and-be-sued was included.
>
> Such a firm practice is partly an indication of the present climate of opinion which has brought Governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope."

The instant claim and counterclaim grew out of contractual obligations undertaken between McLouth and one of these Governmental instrumentalities, i. e., the Emergency Fleet Corporation. The latter has recently been dissolved and its contractual obligations have been voluntarily assumed by the United States (Merchant Marine Act, June 29, 1936, c. 858, Title II, Sec. 203, 49 Stat. 1987). The contractual obligation of the Fleet Corporation to McLouth's estate has been adjudicated. Can there remain any legal or moral bar to judicial computation of amount and recording thereof by the court which the Fleet Corporation's successor has voluntarily selected?

POINT C.

Immunity from affirmative judgment or judicial ascertainment in this case, if any, was waived when the United States, having already taken a general assignment of assets and receivables from the Fleet Corporation, dissolved the latter and assumed its obligations by the Act of June 29, 1936.

Preliminary Statement.

The Fleet Corporation was an instrumentality of the Government. *United States ex rel. Skinner and Eddy v. McCarl, 275 U. S. 1; U. S. Shipping Board Fleet Corporation v. Harwood, 281 U. S. 519; Sloan Shipyards Corporation v. U. S. Shipping Board Fleet Corporation, 258 U. S. 550.* "But (quoting from the *McCarl case*) it was organized under the general laws of the District of Columbia, as a private corporation, with power to purchase, construct and operate merchant vessels. * * * Being a private corporation, the Fleet Corporation may be sued in the state or federal courts like other private corporations; it does not enjoy the priority of the United States in bankruptcy proceedings *(Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp. 258 U. S. 549)*, and its employees are not agents of the United States subject to the provisions of § 41 of the Criminal Code *(United States v. Strang, 254 U. S. 491)*." Likewise, the Fleet Corporation was at all times during its corporate existence answerable in suit upon its contracts, regardless of having contracted "for and on behalf of" or "representing" the United States. *United States ex rel. Skinner & Eddy v. McCarl, supra; U. S.*

Fleet Corporation v. Harwood, supra; Sloan Shipyards Corporation v. United States Fleet Corporation, supra. With these declared principles in mind, we respectfully submit the following outline showing basis in fact of the instant claim and counterclaim.

(a) *Facts Underlying The Government's Claim As Filed In Probate Court.*

Conforming in every material respect to the contracts dealt with in the three last cited decisions of this court, the original contract was entered into between the Fleet Corporation, named as "representing the United States," and McLouth. The contract of settlement between the parties, executed May 24, 1920, designated the Fleet Corporation as "acting for and on behalf of the United States," and a material provision of the contract was that title to all materials then stored with McLouth should rest in the Fleet Corporation as distinguished from the United States (see opinion of Michigan Supreme Court, *281 Mich. 193, 194,* and appendix, page 55). It was McLouth's conversion of these stored materials[1] that gave rise to the cause of action which formed the basis of the Government's claim against McLouth's

(1) McLouth died in 1923 (R. 71). We make this reference to show that the conversion by McLouth (*281 Mich., at page 196*) occurred and the resulting cause of action accrued to the Fleet Corporation before the latter's assets and receivables were assigned in 1923 to the United States. The exact date and circumstances showing accrual of the cause of action do not appear in the present record and, in the absence of such facts, we simply say that we do not believe the act of June 5, 1920 (C. 250, § 4, 41 Stat. 990; 46 U. S. C. A., § 863), affected the then status of rights and equities as between McLouth and the Fleet Corporation. *Providence Eng. Corp. v. Downey Shipbuilding Corp. (C. C. A. 2) 294 Fed. 641 (Cert. Den. 264 U. S. 586).*

estate (fact declared from former appeal record on page 4 of instant petition for writ of certiorari), and it is thus clear that the cause of action exhibited by the Government's claim originally accrued to the Fleet Corporation and not to the United States.

(b) *Facts Underlying Counter-Claim Or Set-of As Asserted In Probate Court.*

When the Fleet Corporation made final settlement with McLouth it, and not the United States, undertook with McLouth to pay his outstanding debt to Ingram-Day Lumber Company. When Ingram-Day Lumber Company sued McLouth to recover such debt, the Fleet Corporation's legal staff took complete charge of the defense.[2] The unsuccessful defense resulted in a judgment of this court against McLouth and consequent allowance[3] of a claim against McLouth's estate in the sum of $58,089.04. The estate's counter-cause of action thereupon arose against the Fleet Corporation on its covenant to assume and pay the Ingram-Day debt.

* * *

We assert on these facts that the cause of action, upon which the instant claim of the Government was predicated,

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(2) The fact that McLouth was exclusively defended by Government counsel fully appears in the successive reports of *Ingram-Day Lumber Company v. McLouth, 6 Fed. (2) 471; 13 Fed. (2) 581; 275 U. S. 471.* The judgment against McLouth in *275 U. S. 471*, because the case had been exclusively defended by the Fleet Corporation, became conclusive of the Fleet Corporation's liability over to McLouth's estate. *Washington Gas Company v. District of Columbia, 161 U. S. 316, 329.*

(3) The claim was duly allowed on October 13, 1932 (R. 14).

originally arose in favor of the Fleet Corporation[4] and that it passed to the United States by the general assignment of 1923. The fact of such assignment is shown by *United States ex rel. Skinner and Eddy v. McCarl, supra,* in the following language:

> "In 1923, the Fleet Corporation assigned to the United States all of its assets, including accounts against divers persons for the payment of money. Thus, the United States is the owner, either as principal or as assign of the Fleet Corporation, of all the claims against Skinner & Eddy."

We also assert on such facts, with particular reliance on the *Harwood case, supra,* that the estate's counterclaim arose against the Fleet Corporation[5] as distinguished from the United States and that the United States voluntarily assumed payment thereof by the Act of June 29, 1936, to which we now respectfully direct attention.

The provision of the Merchant Marine Act of 1936 to which we refer is as follows (46 U. S. C. A., § 1113):

> "(a) The United States Shipping Board Merchant Fleet Corporation shall cease to exist and shall stand dissolved. All the records, books, papers,

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(4) While the United States and the Fleet Corporation have together been generally referred to in these proceedings as the "Government," they are nevertheless distinct and separate for the purposes of present discussion. As evidence that the cause of action accrued to the Fleet Corporation and not to the United States, we refer to *U. S. Fleet Corporation v. Harwood, 281 U. S. 519.*

(5) The corporate name was changed from U. S. Shipping Board Emergency Fleet Corporation to U. S. Shipping Board Merchant Fleet Corporation by the Act of February 11, 1927. C. 104, § 1, 44 Stat. 1083 (46 U. S. C. A., § 810a).

and corporate property of said dissolved corporation shall be taken over by the Commission. All existing contractual obligations of the dissolved corporation shall be assumed by the United States. Any suit against the dissolved corporation pending in any court of the United States shall be defended by the Commission upon behalf of the United States, under the supervision of the Attorney-General, and any judgment obtained against the dissolved corporation in any such pending suit shall be reported to Congress in the manner provided in Section 226, Title 31, United States Code, for reporting judgments against the United States in the Court of Claims." (June 29, 1936, C. 858, Title II, § 203, 49 Stat. 1987).

It is submitted that the United States, having taken over certain of the property of the Fleet Corporation by the Act of June 5, 1920;[6] having taken a general assignment of assets and receivables from the Fleet Corporation in 1923, and thereafter having dissolved the Fleet Corporation with voluntary assumption of the latter's contractual obligations by the Act of June 29, 1936, stands in the position of an assignee who has assumed his assignor's debts and that it is entitled to assert the same rights and immunities in this litigation, and no more, that the Fleet Corporation could have asserted as claimant. The Fleet Corporation as claimant clearly would not have been immune, under any circumstances, from affirmative judgment or determination had it instituted the proceedings in Probate Court;[7] hence the United States as the Fleet Corporation's successor is in the

(6) C. 250, § 1, 41 Stat. 988, 990. (46 U. S. C. A. § 861 *et seq.*).

(7) In addition to the *Sloan Shipyards case*, the *Harwood case*, and the *McCarl case*, hereinbefore cited, this conclusion finds clear support in *Keifer and Keifer v. R. F. C., 306 U. S. 387.*

same position. In support of this contention we rely upon the following authorities.

In *United States v. Buford, 3 Pet. (28 U. S.) 12,* this court reviewed contention that the United States, suing as assignee of a claim against which a statute of limitations had run, was immune from the defense of limitations. It was held:

> "As more than five years had elapsed from the date of the receipt to the assignment, the statute of limitations will bar a recovery of this claim, *unless the transfer of it to the United States has changed its character,* or the terms of the receipt prevent the statute from operating, or, by some promise or agreement between Morrison and Buford, the statute has been waived.
>
> *It can require no argument to show, that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor.* If the character of the claim be so changed, as to exempt it from the operations of the statute of limitations, after the transfer, such transfer cannot have the effect to take the claims out of the statute when it has run."

In *United States v. National City Bank, 83 Fed. (2) 236, 106 A. L. R. 1235 (Cert. Den. 299 U. S. 563),* it was said:

> "In these circumstances it appears that the State of Russia held a deposit to its credit at the bank, the bank owned promissory notes of that depositor payable at the bank, and, when sued, the bank properly resisted to the extent of its set-off. *The United States suing, having no more rights than its assignor, is subject to that set-off.*"

In *United States v. Bank of New York and Trust Company (C. C. A. 2nd), 77 Fed. (2nd) 869 (affirmed 296 U. S. 463)*, it was said:

> "It is enough that we assume without deciding that the plaintiff (United States) has all the rights which the depositing corporation would, if now in existence, possess. *The transfer of those rights to the plaintiff did not enlarge them because the assignee happened to be the United States.* The United States has no greater rights than those of an assignor. *United States v. Buford, 3 Pet. 12, 30, 7 L. Ed. 585; Ritter v. United States (C. C. A.), 28 Fed. (2d) 265.*"

In *Guaranty Trust Company v. United States, 304 U. S. 126*, the question, stated by this court, was "Whether, in a suit at law brought in a federal district court to recover the deposit of a foreign government with a New York bank, such government is subject to the local statute of limitations as are private litigants; and, if so, *whether the assignment* of November 16, 1933, *by the Russian Soviet Government to the United States of the right of the former to the bank account restricts or overrides the operation of the statute of limitations.*" After holding that the Soviet Government, by voluntarily submitting itself to the jurisdiction, was subject to the defense of limitations, this court decided that the United States as assignee was in no better position in the litigation and was likewise subject to the same defense. We respectfully call attention to the following relevant excerpts from the opinion:

> "Third. If the claim of the Russian Government was barred by limitation the United States as its assignee can be in no better position either because of the rule *nullum tempus* or by virtue of the terms of the assignment. We need waste no time on re-

finements upon the suggested distinction between rights and remedies, for we may assume for present purposes that the United States acquired by the assignment whatever rights then survived the running of the statute against the Russian Government, and that it may assert those rights subject to such plea of limitations as may be made by petitioner."

"The question is whether the exemption of the United States from the consequences of the neglect of its own agents is enough to relieve it from the consequences of the Russian Government's failure to prosecute the claim. Proof, under a plea of limitation, that the six-year statutory period had run before the assignment offends against no policy of protecting the domestic sovereign. It deprives the United States of no right, for the proof demonstrates that the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor, which public policy does not forbid. *United States v. Buford, 3 Pet. 12, 30, 7 L. Ed. 585, 591; Rex v. Morrall, 6 Price 24, 28, 30, 146 Eng. Reprint 730.*"

"There is nothing in either document (the agreement and assignment of the Soviet Government and the President's letter in reply) to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. *United States v. Arredondo, 6 Pet. 691, 748, 8 L. Ed. 547, 568; Haver v. Yaker (Jecker v. Magee), 9 Wall. 32, 34, 19 L. Ed. 571, 573; Looley v. United States, 182 U. S. 222, 230, 45 L. Ed. 1074, 1081, 21 S. Ct. 762;*

Nielsen v. Johnson, 279 U. S. 47 52, 73 L. Ed. 607, 610, 49 S. Ct. 223; Todok v. Union State Bank, 281 U. S. 449, 454, 74 L. Ed. 956, 960, 50 S. Ct. 363. The assignment left unaffected the right of petitioner to set up against the United States the previous running of the statute of limitations."

Our contention rests partly upon the status of an assignee suing, partly upon the necessary implications of Congressional action. Governmental immunity from suit can be waived by necessary implication. *United States v. Minnesota, 305 U. S. 388.* It is submitted, aside from the Government's status as an assignee, that an implied waiver occurred in the present case when Congress put the Fleet Corporation out of existence and caused the latter's obligation to McLouth's estate to be assumed by the United States, because such waiver is necessarily incident to full intended effect of the act of June 29, 1936. *Cf. United States v. Jones, 109 U. S. 513, 521.*

An inferred intent on the part of Congress to destroy an existing remedy against the Fleet Corporation, without replacing same with a commensurate one against the United States,[8] would mean injustice. On the other hand an implication, consistent in every respect with contemporaneous disfavor of governmental immunity from

(8) It should be observed that respondent, as holder of an adjudicated contractual obligation of the now dissolved Fleet Corporation, would be remediless in the courts (including the Court of Claims) on the Fleet Corporation's covenant if the implication of waived immunity were not to be applied here.

The instant counter-cause of action is based upon a contract "*containing no words purporting to bind the United States*" *(Harwood case, supra)*, and consequently is not founded upon a "contract, express or implied, with the Government of the United States," within the language or meaning of the Court of Claims Act.

suit *(Keifer and Keifer v. R. F. C., 306 U. S. 391)*, that Congress purposed the United States should assume the status as well as the debts of its corporate agency for the winding-up purposes of the Act of 1936, means equity and justice and partakes of reason.

The question presented is an important one. It is fair to assume that Congress some day will find it advisable to dissolve, in much the same manner, the Reconstruction Finance Corporation and numerous other governmentally created corporations which, like the Fleet Corporation, are subject to suit upon their undertakings. Unless Congress explicitly takes care of the situation each time it dissolves such a corporation, the present question is bound to recur.

CONCLUSION.

More than 19 years ago the Fleet Corporation, a now dissolved instrumentality of the Government, undertook with McLouth that it would assume and pay his debt to Ingram-Day Lumber Company. The promise has never been kept and the Government has meanwhile shamefully litigated Ingram-Day Lumber Company and a small estate through twelve separate decisions of various state and federal courts in continual effort to evade the Fleet Corporation's promise. Notwithstanding that Congress once enacted a bill for payment of the debt to Ingram-Day Lumber Company,[1] and notwithstanding that Presidential objection to the bill[2] has now been

1. 73rd Congress, 2nd Session, H. R. 7615, S. 854.

2. The bill was vetoed by President Roosevelt for the following reason: "Disapproved because no provision is made for the Government's counterclaim." Congressional Record, Vol. 78, Part 11, page 12457.

satisfied through *pro tanto* application of the Government's claim to the Ingram-Day debt, the Government continues this litigation in repudiation of an undertaking it voluntarily assumed by the Act of June 29, 1936, even though there can now be no question as to the fact or amount of its adjudicated liability.

This court made final adjudication, in *Ingram-Day Lumber Company v. McLouth, 275 U. S. 471,* of the fact and amount of McLouth's debt to Ingram-Day Lumber Company, and the Supreme Court of Michigan made final adjudication, *on former appeal,* of the Government's liability to pay such debt. We quote from the Michigan Supreme Court's opinion on such former appeal *(281 Mich., at page 200):*

> "The judgment *(275 U. S. 471)* became the liability of appellant (United States) either as principal or as assignee of the Fleet Corporation."

Consequently, if the salutary rule of the Thekla is to be unfettered, and we suggest that this court's opinion definitely declares such intention and purpose, the Michigan Supreme Court's present judgment is right in law as a judicially wholesome circumvention of the "prerogative of dishonesty" (Vol. LIII, No. 2, Harv. Law Rev., page 336).

We respectfully submit, in conclusion, that the present case is governed by a decision of this court which ended, once and for all, the Government's originally alleged right to submit partially instead of wholly to the jurisdiction of a court it has voluntarily entered as a suitor. We also submit that the determination of amount owing by the Government, on judicial settlement and approval

of claim and counterclaim in this case, does not offend the early decisions of this court upon which the Government relies. Aside from these considerations respondent asserts, with respect and earnestness, that the United States actually stands in the shoes of the Fleet Corporation for the purposes of this litigation and that it waived immunity from full adjudication of all questions legitimately involved when it took assignment of the instant claim, voluntarily prosecuted same in the state court and voluntarily assumed payment of the estate's counterclaim.

On the foregoing presentation respondent respectfully submits that the judgment of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

SHIRLEY STEWART,
EUGENE F. BLACK,
HOWELL VAN AUKEN,
Counsel for Respondent.

APPENDIX.

Opinion of Circuit Court of Michigan which was reviewed and affirmed by Michigan Supreme Court *In re McLouth's Estate (United States v. Shaw), 281 Mich. 191.*

(A certified copy of this opinion is herewith filed with the Clerk of the Supreme Court of the United States.)

STATE OF MICHIGAN—In the Circuit Court for the County of St. Clair.

In Re The Estate of Sydney C. McLouth, Deceased.

John C. Shaw, Administrator De Bonis Non of said Estate; Jacob S. Goldman and Ingram-Day Lumber Company,
Appellants,
v.
United States of America,
Appellee.

OPINION, SUBSTANCE OF JUDGMENT AND STATEMENT OF REASONS THEREFOR.

Appellants have fairly stated the material facts in their brief. The following statement, with minor changes and additions made by the court, is taken therefrom:

Sydney C. McLouth, a resident of St. Clair County, deceased September 22, 1923. His estate has been in the course of administration since that date under the jurisdiction of the Probate Court for said county. Mr. McLouth was insolvent at the time of his decease and his

estate has at all times been insufficient to pay all debts due from him. Hearing of claims against his estate was duly closed several years before the instant claim was filed, and dividends totaling fifteen per cent were meanwhile paid on general claims.

In October of 1933, the United States of America filed the instant claim against Mr. McLouth's estate and petitioned the Probate Court for its allowance. The claim is based entirely on a judgment entered April 25, 1933, by the District Court of the United States, Eastern District of Michigan, Southern Division, in favor of United States of America as plaintiff and against John C. Shaw, administrator of said estate, as defendant. The suit resulting in the judgment was commenced against the administrator after the decedent's death, no creditor of the estate was made party thereto and it is not claimed that any one of them ever received notice of the pendency of the suit and the progress thereof until after the instant claim was filed.

The judgment, amounting to $40,165.40, represents the total verdict found in favor of the Government on all three counts of its declaration in the case. In the first count, the Government alleged that in March of 1921 it, acting through United States Shipping Board Emergency Fleet Corporation, sold Mr. McLouth a quantity of lumber which he did not fully pay for, leaving a balance due from him of $7,134.15, which amount, with accrued interest thereon, totaled $11,449.00 at the time of trial. In the second count, the Government alleged that in June of 1922 it, acting through the Fleet Corporation, sold Mr. McLouth three marine engines which he did not fully pay for, leaving a balance due from him of $1,000.00, which amount, with accrued interest thereon, totaled $1,550.00 at the time of trial. Liability of the estate under such counts was admitted by the administrator

(then represented by other counsel) in open court, no issue as to such liability was presented, and the trial judge instructed the jury to find for the Government on such counts in the respective totals noted above.

The third count represents a claim, duly proved in the District Court action, for the value of materials bailed to the decedent and not accounted for by him. Subtracting the total of the items so admitted, viz., $12,999.00, from the amount of the total verdict, leaves a balance of $27,166.40. The latter figure represents the amount of the verdict and judgment under the third count.

Objections to the claim as filed were regularly entered and submitted in the Probate Court by the administrator and by two creditors whose claims had theretofore been duly allowed against the estate. The Probate Court, after due notice and hearing, allowed the claim in full and granted preference to same under Section 3466 of the Revised Statutes of the United States and the third subdivision of C. L. Michigan, 1929, Section 15599. The administrator and the two objecting creditors have duly appealed from such judgment to this court.

The instant claim, and the set-off urged against same, are based upon the following facts shown in evidence:

On August 21, 1918, a written contract was entered into between United States Shipping Board Emergency Fleet Corporation and Mr. McLouth for construction of four ocean-going tugs. This contract is entitled:

"Contract Between Sydney C. McLouth
and
United States Shipping Board
Emergency Fleet Corporation."

Its opening paragraph reads:

"Contract made this 21st day of August, 1918, between Sydney C. McLouth, an individual, party

of the first part (herein called the Contractor) and the United States Shipping Board Emergency Fleet Corporation, Corporation organized under the laws of the District of Columbia (herein called the Owner), representing the United States of America, party of the second part,"

and its fifth paragraph reads:

"TITLE—

It is agreed that title to all vessels, either completed or under construction, insofar as they shall have been inspected and approved by the Owner, shall be in the United States of America, and that the title to all material for the furtherance of work under this contract, however and by whomsoever contracted for, or assembled, or set up in the shipyard, or used in the construction of the work under this contract, shall be in the Owner at all times."

On September 17, 1918, a supplemental contract was entered into in writing between the parties providing for construction of five additional tugs. This contract is a duplicate of the construction contract of August 21, 1918, insofar as the quoted provisions are concerned.

After the Armistice was signed, work under these ship construction contracts was suspended by the Fleet Corporation and it thereupon entered into contracts with the decedent for storage at his shipyard of the tackle, equipment and paraphernalia originally intended for the hulls built in pursuance of such construction contracts. The storage contracts are evidenced by an exchange of letters between the Fleet Corporation and Mr. McLouth dated November 20, 1919, and November 26, 1919, and by formal written contract between the Fleet Corporation and Mr. McLouth dated October 1, 1920.

It is unquestioned that the lot of ship materials bailed to Mr. McLouth by these contracts disappeared from his warehouse and, following his death, that same could not

be accounted for or produced by his representatives. This fact, i. e., breach by Mr. McLouth of the storage contracts, gave rise to the cause of action set forth in the third count of the declaration above mentioned.

On May 24, 1920, a written contract was entered into between Mr. McLouth and the Fleet Corporation, designated as "acting for and on behalf of the United States of America," providing for cancellation of the ship construction contracts and for complete adjustment of the rights of the parties thereunder. This contract contains the following pertinent clauses:

> "Whereas, the Contractor represents that for the purpose of performing the work called for by said Original Contract, he has made various commitments and subcontracts for materials, supplies, etc., prior to the time when he received notice from the Owner to suspend operations on the hulls as hereinbefore mentioned, and
>
> Whereas, the parties hereto now desire to have said subcontracts and commitments adjusted and paid, and
>
> Whereas, the Contractor has now presented to the Owner all its claims of every nature in connection with the suspension of said Original Contract, and
>
> Whereas, the parties hereto now desire to cancel said Original Contract and by this agreement to compromise, adjust and make full and final settlement of all matters in connection therewith."
>
> "ARTICLE II.
>
> The Contractor hereby bargains, sells and conveys unto the Owner all of its right, title and interest in and to said subcontracts and commitments in connection with the Original Contract now outstanding and unpaid, which a proper audit by the Owner shall show to have been properly incurred for the performance of the work under the contract, and which did not exceed the requirements of the Contract; and the Owner shall forthwith adjust and pay such of said subcontracts and commitments as shall in the

judgment of the Owner, be proper under the contract."

A schedule of commitments approved for payment under said Article II was drawn up by the Fleet Corporation and forwarded Mr. McLouth by letter of August 9, 1920. This letter expressly declares:

> "There is attached copy of Schedule 5 'Commitments' which are to be assumed, adjusted and settled by this corporation under the terms of the adjustment agreement with yourself dated April 21st, 1920, and supplemental thereto dated May 24th, 1920."

One of the commitments of Mr. McLouth included in the schedule forwarded with this letter was one in favor of Ingram-Day Lumber Company in the sum of $44,000.00. Neither the Fleet Corporation nor the Government has ever paid or adjusted this commitment. Ingram-Day Lumber Company accordingly sued Mr. McLouth on the commitment and ultimately recovered judgment in the case in the sum of $42,789.96 *(Ingram-Day Lumber Company v. McLouth, 275 U. S. 471; 72 L. Ed. 378)*. Defense of the suit, from inception to end, was completely taken over and controlled by the Fleet Corporation and in turn by the Government. The judgment entered in the case forms the basis of a claim against the estate which was duly allowed October 13, 1932, in favor of Ingram-Day Lumber Company. The claim so allowed exceeds in amount the instant claim as presented and appellants contend that the latter is extinguished by the former under Section 951 of the Revised Statutes of the United States.

FIRST: The only proof of its claim which the Government has offered is the judgment which it recovered in District Court against the administrator. Appellants contend that the judgment is jurisdictionally defective

for want of compliance, in the suit leading up to the judgment, with local law requiring notice to all interested parties. The contention is unassailable and must be upheld. Service of process on the administrator only, without a showing of some sort that the creditors of the estate had authorized him to represent them, conferred no jurisdiction on the District Court to enter judgment in the case binding upon or affecting the rights of such creditors. Under local law the creditors were entitled to notice of any suit brought to establish a claim against the estate, and this local rule was binding upon the District Court in the suit which led up to the judgment in question. See *Compiler's Sections 15680 and 15681, Michigan C. L. 1929; Day v. Dullam, 235 Mich. 516; Security Trust Company v. Black River Bank, 187 U. S. 221; Waterman v. Canal-Louisiana Bank & Trust Company, 215 U. S. 35,* and *Pufahl v. Parks (U. S.), 81 L. Ed. 73.* The judgment consequently has no probative force against appellant creditors.

The only claim which has been established against the decedent's estate is the one conceded by appellants in open court; that is, the claim exhibited by the third count of the Government's declaration in the District Court suit. The amount thereof is $27,166.40, plus accrued interest thereon.

SECOND: It will be noted that the various contracts and agreements, out of which the instant claim and counter-claim arose, were exclusively between the decedent and the Fleet Corporation. As in *Harwood v. Fleet Corporation,* 281 U. S. 519, the contracts between the parties "contained no words purporting to bind the United States or in terms restricting the liability of the petitioner (Fleet Corporation)." The Fleet Corporation was a private corporation, bound in every way to its obligations as are individuals and other private cor-

porations. If the instant claim, which originally accrued to the Fleet Corporaton in its own right, had been presented in the Probate Court by the Fleet Corporation instead of the Government, it would clearly be subject to proper set-off. See *Sloan Shipyards Corporation, 258 U. S. 549; United States v. McCarl, 275 U. S. 1; United States v. Wood, 290 Fed. 109; 263 U. S. 678.* Why then, simply because the Government is the Fleet Corporation's assignee (See *U. S. v. McCarl, supra*), should the instant claim be thereby immunized from proper set-off? The fact of assignment to the Government does not of itself free the claim from such set-off (see *United States v. Bank of New York, 77 F. (2) 869, affirmed 296 U. S. 463*), and the Government apparently does not contend so.

The principal position of the Government with reference to this set-off is that the Probate Court, and in turn this Court, is without jurisdiction to hear and determine a set-off or counter-claim in a suit brought by the Government, and reliance is had upon the standard defense that the Government cannot be sued without its consent. The legal conclusion is correct but the premise is erroneous. Congressional consent to the presentation and determination of such a set-off is to be found in Section 951 of the Revised Statutes of the United States (28 U. S. C. A., Section 774). This section authorizes, in suits brought by the Government against individuals, presentation and determination of credits by way of set-off, provided the interposed claims for credit have been properly submitted to and rejected by the designated officer or officers of the Government. The requirement of the section, as to submission and rejection, has been duly complied with by the administrator since the decision in *Shaw v. United States, 75 F. (2) 175*, and no claim to the contrary is urged by the Government.

The Government contends, however, that Section 951 of the Revised Statutes is not applicable to suits brought by the Government in State courts. No authority is cited in support of this contention and it is overcome, in my opinion, by the construction that was placed on the section in *United States v. Wilkins, 19 U. S. 137; Watkins v. United States, 76 U. S. 762; United States v. Fillebrown, 7 Peters 28, 8 L. Ed. 596,* and *United States v. Wade, 75 Fed. 261.* As the textwriter says of Section 951 in *24 R. C. L. 812:*

> "Although direct suits cannot be maintained against the United States, nor against its property, yet, when the United States institutes a suit, it waives its exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and it is held that the right of set-off is implied by the act of March 3, 1797 (now Section 951, R. S.), which provides * * *."

It would be a strained construction indeed which would read into Section 951 an intention to limit its obviously general scope to suits brought by the Government in District Courts. The section is clear and concise, and it definitely covers all suits brought by the Government against individuals. *United States v. Skinner & Eddy Corporation, 35 F. (2) 889,* and *Nassau Smelting Works v. United States, 266 U. S. 101,* cited to the point by the Government, are clearly inapplicable. Decision in these cases turned upon the Tucker Act, which affects the jurisdiction of the Courts of the United States only, and upon the Dent Act, which provided exclusive remedy in the Court of Claims upon certain contracts made prior to the Armistice under authority of the Secretary of War and the President.

THIRD: The remaining objection of the Government to this set-off attacks the merit thereof. The contention

of counsel in this regard is best exhibited by the following quotations from their brief:

"The Court will note that the provisions in Article II do not constitute a contract of indemnity. The Fleet Corporation (acting on behalf of the United States) does not agree to save decedent McLouth harmless for all of his commitments. The only promise is a qualified one. The promise is to 'adjust and pay such of said contracts and commitments as shall, in the judgment of the owner, be proper under the contract.' This promise is further qualified by the limitation that the commitments to be paid are those 'which a proper audit by the owner shall show to have been properly incurred for the performance of the work under the contract, and which did not exceed the requirements of the contract.'

"When the *Ingram-Day case* was considered on certiorari *(275 U. S. 471)* the Supreme Court said (page 473):

> 'The statute authorized the cancellation of the Government's own contracts, made after its enactment, and just compensation for such cancellation does not include anticipated profits, ordinarily recoverable in an action of assumpsit. *Duesenberg Motors Corp. v. United States, 260 U. S. 115; Russell Motor Company v. United States, 261 U. S. 514.*'

"It was unfortunate that the findings of fact of the District Court did not disclose that the Ingram-Day commitment was canceled because of the cancellation of McLouth's contract by the Fleet Corporation (if such was the fact) because the Supreme Court held (page 474) that on the record and the evidence the rights of the Ingram-Day Lumber Company 'were not dependent on the continued existence of the other' (contract).

"In the face of this conclusive determination of the facts by the Supreme Court, it canont be logically or successfully contended that the Ingram-Day commitment was one which the Government

should pay, as a part of just compensation. The fact being established that the Ingram-Day Lumber Company loss (exclusive of profits) was only $647.65, that amount is the limit decedent or his estate could have collected from the Government, under any circumstances."

The trouble with counsel's argument is that it lacks factual support. The various contracts between the parties completely overcome any thought that the Fleet Corporation, in its dealings with the decedent, clothed itself with the immunities and privileges of the sovereign, or that there was to be restriction of any kind on its undertakings. See *Harwood v. Fleet Corporation, supra*. Likewise, the contention that the Fleet Corporation's promise contained in Article II of the settlement contract was a "qualified one" overlooks subsequent correspondence between the parties. By its letter of August 9, 1920, addressed to the decedent, the Fleet Corporation expressly identified the claim exhibited by this set-off as one which it was to assume, adjust and settle in pursuance of said Article II. The undertaking of the Fleet Corporation as set forth in said Article II, linked by reference with the letter and enclosure of August 9, 1920, completed a contractual obligation of the Fleet Corporation to pay the Ingram-Day commitment. These facts, which are not disputed, are sufficient to render the Fleet Corporation liable to the decedent's representatives upon a showing of nonpayment or adjustment.

The cause of action supporting this claim of set-off is not presented as, and could not be, a direct claim against the Government. It is not presented as, and could not be, a claim for "just compensation." It is a claim for damages based upon breach of contract by a private corporation, and it is presented as a set-off against an original indebtedness to that same corporation which is

now held by an assignee. As a result of the Fleet Corporation's breach of its undertaking to "adjust and pay" the commitment, the decedent was sued thereon by Ingram-Day Lumber Company, which ultimately recovered judgment against his estate in the sum of $42,789.96 *(see Ingram-Day Lumber Company v. McLouth, 275 U. S. 474)*, and his estate has become fettered with a claim in favor of Ingram-Day Lumber Company, duly allowed on October 13, 1932, in the sum of $58,089.04.

In my opinion, the Fleet Corporation rendered itself liable to the decedent and his representatives for payment of the decedent's said commitment and, having failed to pay or adjust same, that a completed cause of action arose against it to the extent fixed by the letter and enclosure of August 9, 1920. Justice and equity, as well as applicable legal principles, require that such cause of action against the Fleet Corporation be set off against the original claim of that same corporation.

Judgment will be entered on the date hereof reversing the order of the Probate Court and remanding the case to that court with direction to disallow the instant claim in full. The usual twenty-day stay of proceedings, pending appeal, is granted.

FRED W. GEORGE,
Circuit Judge.

Dated: February 8, 1937.

SUPREME COURT OF THE UNITED STATES.

No. 570.—October Term, 1939.

The United States of America, Petitioner, *vs.* John C. Shaw, Administrator *De Bonis Non* of the Estate of Sydney C. McLouth, Deceased.	On Writ of Certiorari to the Supreme Court of the State of Michigan.

[March 25, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

In 1918 Sydney C. McLouth contracted to construct nine tugs for the United States Shipping Board Emergency Fleet Corporation. On May 24, 1920, the contract was cancelled and the parties entered into a settlement agreement providing that McLouth was to keep as bailee certain materials furnished him for use in building the tugs and that the Fleet Corporation was to assume certain of McLouth's subcontracts and commitments. Among the commitments assumed was a contract of McLouth's to purchase lumber from the Ingram-Day Lumber Company. The Lumber Company obtained a judgment against McLouth for $42,789.96 for breach of this contract,[1] and, McLouth having died in 1923, filed its claim on the judgment in the probate court of St. Clair County, Michigan. Subsequently the United States obtained a judgment of $40,165.48 against McLouth's administrator,[2] representing damages for the conversion of the materials left with McLouth as bailee, and claim on this judgment was filed in the probate court. The administrator, respondent here, having presented without success the Lumber Company's judgment to the General Accounting Office,[3] sought to set

[1] Ingram-Day Co. v. McLouth, 275 U. S. 471.

[2] Shaw v. United States, 75 F. (2d) 175.

[3] The Act of March 3, 1797, 1 Stat. 512, 514, as amended, 28 U. S. C. § 774 provides that in "suits brought by the United States against individuals, no claim for a credit shall be admitted . . . except such as appear to have been presented to the General Accounting Office for its examination, and to have been by it disallowed. . . ."

off that judgment against the judgment of the United States. The probate court allowed the claim of the United States and denied the set-off, but its ruling as to the set-off was reversed on appeal to the Michigan Supreme Court.[4] The administrator then petitioned the probate court to grant statutory judgment of the balance due the estate. The court found that the claim of the United States, with interest, amounted to $49,442.41 and the Lumber Company's claim to $73,071.38 and "ordered, adjudged and ascertained" that the United States was indebted to the estate for the difference, $23,628.97, "and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate by the United States of America." The probate court's judgment was affirmed on appeal.[5]

On this certiorari we are concerned with the question whether the United States by filing a claim against an estate in a state court subjects itself, in accordance with local statutory practice, to a binding, though not immediately enforceable, ascertainment and allowance by the state court of a cross-claim against itself.

Because of different views of other federal courts as to the decisions of this Court in the important federal field of cross-claims against the United States,[6] we granted certiorari.[7] *United States* v. *United States Fidelity and Guaranty Company*[8] involves this question.

The statute of Michigan under which this ascertainment of indebtedness was made, so far as pertinent, is set out in the footnote.[9]

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[4] In re McLouth's Estate, 281 Mich. 191.

[5] 290 Mich. 311.

[6] Cf. United States *v.* Eckford, 6 Wall. 484; The Thekla, 266 U. S. 328; In re Patterson-MacDonald Shipbuilding Co., 293 Fed. 192 (C. C. A. 9), certiorari denied, *sub nom.* McLean *v.* Australia, 264 U. S. 582. Roumania v. Guaranty Trust Co., 250 Fed. 341 (C. C. A. 2), certiorari denied, 246 U. S. 663; United States *v.* Nipissing Mines Co., 206 Fed. 431, 434 (C. C. A. 2); Adams *v.* United States, 3 Ct. Cls. 312, 333; Peterson *v.* United States, 26 Ct. Cls. 93, 98. United States *v.* National City Bank, 83 Fed. (2d) 256 (C. C. A. 2), certiorari denied, 299 U. S. 563; American Propellor Co. v. United States, 300 U. S. 475; Guaranty Trust Co. *v.* United States, 304 U. S. 126.

[7] January 8, 1940.

[8] No. 589, this term, decided today.

[9] Compiled Laws of Michigan (1929), c. 266, sec. 15682:

"Set-offs in settlement of claims. Sec. 9. When a creditor against whom the deceased had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be; but no claim barred by the statute of limitations shall be allowed by the commissioners in favor of or against the estate, as a set-off or otherwise."

There is no contention on the part of respondent that the judgment is enforceable against the United States even in the limited sense of statutory direction to report the judgment to Congress as in the Court of Claims Act[10] or the Merchant Marine Act.[11] Execution against property of governmental agencies subjected to such procedure by statute is sometimes allowed.[12] The position taken is that the probate court judgment is a "final determination" of the rights of the litigants, howsoever such rights may later become important. We are not here concerned with the manner of collection. Such was the holding of the Supreme Court of Michigan.[13]

The state procedure for the determination of the balance against or in favor of an estate, which was employed here, was the recognized method of closing an estate at the time of the probate judgment. The probate judge was empowered to act as commissioner under the statute quoted above.[14] His decision unreviewed was considered final.[15] The determination of the probate court between private parties was enforceable without reexamination in the circuit court.[16] Even the right to execution is not essential to a complete judicial process.[17] The order entered was a final determination of the amounts due the estate by the United States on this claim and cross-claim if the probate court had jurisdiction to render the order against the petitioner.

Whether that jurisdiction exists depends upon the effect of the voluntary submission to the Michigan court by the United States of its claim against the estate. As a foundation for the examination of that question we may lay the postulate that without specific statutory consent, no suit may be brought against the United States.[18] No officer by his action can confer jurisdiction.[19] Even when suits

[10] 31 U. S. C. § 226.

[11] 46 U. S. C. § 1113.

[12] F. H. A. *v.* Burr, No. 354, this term, decided February 12, 1940.

[13] Flynn *v.* Lorimer's Estate, 141 Mich. 707.

[14] 290 Mich. 311.

[14] 3 Comp. Laws Mich. (1929), sec. 15681.

[15] Flynn *v.* Lorimer's Estate, 141 Mich. 707.

[16] Shurbun *v.* Hooper, 40 Mich. 503.

[17] Nashville, C. & St. L. Ry. *v.* Wallace, 288 U. S. 249, 263; Flynn *v.* Lorimer's Estate, 141 Mich. 707.

[18] Kansas *v.* United States, 204 U. S. 331; United States *v.* Thompson, 98 U. S. 486, 489, 490; Buchanan *v.* Alexander, 4 How. 20.

[19] Stanley *v.* Schwalby, 162 U. S. 255, 270; Carr *v.* United States, 98 U. S. 433, 437.

are authorized they must be brought only in designated courts.[20] The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants. A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. By the act of March 3, 1797, and its successor legislation, as interpreted by this Court, cross-claims are allowed to the amount of the government's claim, where the government voluntarily sues.[21] Specially designated claims against the United States may be sued upon in the Court of Claims or the district courts under the Tucker Act.[22] Special government activities, set apart as corporations or individual agencies, have been made suable freely. When authority is given, it is liberally construed.[23] As to these matters no controversy exists.

Respondent contends this immunity extends, however, only to original suits; that when a sovereign voluntarily seeks the aid of the courts for collection of its indebtedness it takes the form of a private suitor and thereby subjects itself to the full jurisdiction of the court. The principle of a single adjudication is stressed, as is the necessity for a complete examination into the cross-claim, despite attendant dislocation of government business by the appearance of important officers at distant points and the production of documents as evidence, to justify the allowance of an offset to the government's claim.[24] It is pointed out that surprise is not involved as no cross-claim may be proven until after submission to and refusal by the government accounting officers.[25] Respondent further insists that his position is supported by *The Thekla*[26] and subsequent de-

[20] Minnesota v. United States, 305 U. S. 382, 388.

[21] 1 Stat. 512, 514; R. S. § 951; 28 U. S. C. § 774. United States v. Wilkins, 6 Wheat. 135, 144.

[22] 28 U. S. C. §§ 41(20), 250.

[23] Keifer & Keifer v. R. F. C., 306 U. S. 381; F. H. A. v. Burr, *supra*.

[24] United States v. Wilkins, *supra*.

[25] 28 U. S. C. § 774.

[26] 266 U. S. 328.

cisions quoting its language.[27] Emphasis is placed upon the fact that these probate proceedings are in rem or quasi in rem[28] as were the libels in admiralty in *The Thekla*.

It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress. We, of course, intimate no opinion as to the desirability of further changes. That is immaterial. Against the background of complete immunity we find no Congressional action modifying the immunity rule in favor of cross-actions beyond the amount necessary as a set-off.

The Thekla turns upon a relationship characteristic of claims for collision in admiralty but entirely absent in claims and cross-claims in settlement of estates. The subject matter of a suit for damages in collision is not the vessel libelled but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability.[29] In equal fault, the entire damage is divided. As a consequence when the United States libels the vessel of another for collision damages and a cross-libel is filed, it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision. That conclusion must be stated in terms of responsibility for damages. In *The Thekla* opinion the cases of *Illinois Central Railroad Company* v. *Public Utilities Commission*[30] and *Nassau Smelting Works* v. *United States*[31] were cited in support of the statement that " . . . generally speaking a claim that would not constitute a cause of action against the sovereign cannot be asserted as a counterclaim." This Court then said: "We do not qualify the foregoing decisions in any way." In the *Smelting* case this Court had said, two weeks before, on a certificate as to the jurisdiction of the district court to consider a counterclaim:

"The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it. Nor is there doubt that the question is one which involves the jurisdiction of the District

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[27] See note 33, *infra*.

[28] United States v. Bank of New York Co., 296 U. S. 463, 477; Montgomery v. Wayne Circuit Judge, 284 Mich. 430.

[29] Bowker v. United States, 186 U. S. 135, 139.

[30] 245 U. S. 493, 504, 505.

[31] 266 U. S. 101.

Court as a federal court under the statutes of the United States, for the jurisdiction of the District Court in this regard is wholly dependent on such statutes."[32]

There is little indication in the facts or language of *The Thekla* to indicate an intention to permit generally unlimited cross-claims. Quotations from *The Thekla* in later opinions of this Court are used to illustrate problems entirely apart from the one under consideration here.[33]

The suggestion that the order of the probate court is in reality not a judgment but only a "judicial ascertainment" of credits does not affect our conclusion. No judgment against the United States is more than that. But such an entry, if within the competence of the court passing the order would be res judicata of the issue of indebtedness.[34] The suggestion springs from the opinion in *United States* v. *Eckford*.[35] These words there appear:

"Without extending the argument, we adopt the views expressed by this court in the case of *De Groot* v. *United States*, (5 Wallace 432) decided at the last term, that when the United States is plaintiff and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount."

The Court had just written that no action could be sustained against the government without consent and that to permit a demand in set-off to become the foundation of a judgment would be the same thing as sustaining the prosecution of a suit.[36] The language quoted above means no more than that no judgment may be entered against the government even though the court has ascertained through its processes that the government is actually indebted to the defendants. The judgment should be limited to a dismissal of the government's claim.

In the *Eckford* case this Court was dealing with the litigation at a more advanced stage than the present litigation has reached. The

[32] *Id.*, 106.

[33] American Propellor Co. v. United States, 300 U. S. 475, 478; Guaranty Trust Co. v. United States, 304 U. S 126, 134.

[34] Williams v. United States, 289 U. S. 553, 564.

[35] 6 Wall. 484, 491.

[36] Cf. Reeside v. Walker, 11 How. 272, 290.

United States had sued Eckford's executors on his bond in the District Court for the Southern District of New York. They pleaded a set-off, a balance was found in their favor and a judgment entered that the executors were entitled to be paid the amount found. Suit in the Court of Claims was instituted by the executors, the record was proven, over objection, and judgment entered accordingly. Consequently a reversal of the Court of Claims was the only step necessary. This Court did not deal with the New York judgment.[37]

We have considered respondent's further argument that sovereign immunity was waived when the United States took possession of the assets of its agent the Fleet Corporation prior to the institution of this action and later, but prior to the entry of the probate judgment appealed from, assumed the Corporation's obligations by the act of June 29, 1936.[38] We see nothing in these transactions which indicates an intention to waive the immunity of the United States in the state courts.

Reversed.

Mr. Justice McREYNOLDS took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[37] Cf. Schaumburg *v.* United States, 103 U. S. 667.

[38] 49 Stat. 1987:

"SEC. 203. The United States Shipping Board Merchant Fleet Corporation shall cease to exist and shall stand dissolved. All the records, books, papers, and corporate property of said dissolved corporation shall be taken over by the Commission. All existing contractual obligations of the dissolved corporation shall be assumed by the United States. Any suit against the dissolved corporation pending in any court of the United States shall be defended by the Commission upon behalf of the United States, under the supervision of the Attorney General, and any judgment obtained against the dissolved corporation in any such pending suit shall be reported to Congress in the manner provided in section 226, title 31, United States Code, for reporting judgments against the United States in the Court of Claims."